No. (1)

Supreme Court, U.S.
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IN THE

United States Supreme Court

LOCAL UNION NO. 38, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO,

Petitioner,

against

ANTHONY PELELLA,

Respondent.

Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

QUESTIONS PRESENTED FOR REVIEW

1. Does the second proviso to 29 U.S.C. § 411(a)(4), Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act, which bars an interested employer from financing the institution of a suit by an employee against his union, allow an interested employer to finance the assertion of a counterclaim by an employee against his union.

2. Are punitive damages constitutionally permissible under *State Farm Mutual v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003), when there has been no economic harm.

3. Are punitive damages an appropriate remedy under the Labor - Management Reporting and Disclosure Act, 29 U.S.C. § 401 *et seq.*, absent an express Congressional intention to allow it.

LIST OF PARTIES

The parties to the proceeding in the United States Court of Appeals for the Second Circuit were the petitioner, Local Union No. 38, Sheet Metal Workers' International Association, AFL-CIO, and the respondent, Anthony Pelella.

RULE 29.6 STATEMENT

Petitioner, Local Union No. 38, Sheet Metal Workers' International Association, AFL-CIO , is an unincorporated assoćiation; does not have a parent corporation and no publicly held company owns 10% or more of its stock.

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entered May 21, 2001.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Local Union No. 38, Sheet Metal Workers' International Association, AFL-CIO, (Local 38), respectfully requests that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Second Circuit, decided November 17, 2003, which affirmed the United States District Court for the Southern District of New York (Yanthis, M.J.).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *Local Union No. 38, Sheet Metal Workers' International Association, AFL-CIO, v. Anthony Pelella,* 350 F.3d 73 (2nd Cir. 2003) (App.A). The opinions of the United States District Court for the Southern District of New York are not reported, but can be found in App. B and App. C.

BASIS FOR JURISDICTION

The Judgment and Decree of the United States Court of Appeals for the Second Circuit was issued on November 17, 2003. Local 38's petition for panel rehearing and petition for rehearing en banc were denied on January 22, 2004. The Mandate of the Second Circuit was filed on February 9, 2004, and recalled on February 20, 2004, pending the disposition of this petition for certiorari This Court has jurisdiction to review the decree and judgment of a court of appeals pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

29 U.S.C. 411(a)(4) provides in pertinent part that:

> "No labor organization shall limit the right of any member thereof to institute an action in any court, ... Provided, That any such member may be required to exhaust reasonable hearing procedures ... within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: And **provided further, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.**" (emphasis supplied).

STATEMENT OF THE CASE

After a trial before the Executive Board of Local 38, Local 38 brought this action to collect a $4,418.00 fine levied against Pelella for various alleged violations of Local 38's Constitution. Pelella counterclaimed against Local 38 for damages of $200,000.00 for various violations of his rights as a member of Local 38. Local 38's Reply alleged that the counterclaim was financed by an interested employer in violation of 29 U.S.C. § 411(a)(4), which prohibits employer financed suits against labor organizations.

Local 38 moved for partial summary judgment to dismiss the counterclaim. The action was heard by United States Magistrate Judge Yanthis on the consent of the parties pursuant to 28 U.S.C. § 636(c). The District Court denied Local 38's motion, essentially deciding that 29 U.S.C. §

411(a)(4) did not apply to counterclaims. A jury trial was held on November 26 and 27, 2001, and resulted in a dismissal of Local 38's claims; compensatory damages for Pelella on his counterclaim of $0.00; nominal damages of $1.00; punitive damages of $25,000.00. Local 38 moved to set aside the punitive damage award and the District Court denied that motion.

Local 38's appeal to the Second Circuit was unsuccessful, as was its Petition for Rehearing with a Suggestion for Rehearing En Banc.

REASONS FOR GRANTING THE WRIT

1. The Court Should Grant Certiorari To Resolve An Issue Of Labor Law That Is Of National Importance. The Court Should Resolve Whether Or Not The Second Proviso To 29 U.S.C. § 411(a)(4), Section 101(a)(4) Of the Labor Management Reporting And Disclosure Act, Which Bars An Interested Employer From Financing The Institution Of A Suit By An Employee Against His Union, Allows An Interested Employer To Finance The Assertion Of A Counterclaim By An Employee Against His Union.

Other than the Second Circuit decision in this case, there is only a Seventh Circuit case , decided in 1974, which construes the second proviso of 29 U.S.C. § 411(a)(4), *International Brotherhood of Electrical Workers, Local 336 v. Illinois Bell Telephone Company*, 496 F.2d 1 (7th Cir. 1974), cert. den., 419 U.S. 879, 95 S.Ct. 144, 42 L.Ed.2d 120 (1974). That case also holds that the second proviso to 29 U.S.C. § 411(a)(4) is not applicable to a counterclaim.

> "But the language Congress chose prohibits the financing of 'any such action,' which refers

> back to the right of a member 'to institute an action in any court.' We can only presume that Congress meant what it said, that an interested employer may not finance the institution of a suit by employees, but is free to finance a defense or a counterclaim." 496 F.2d 1, 3.
>
> "We reach this conclusion reluctantly, because we recognize that the harm to the union is the same whether the employer finances defensive resistance to union discipline or underwrites the filing of a suit to enforce the LMRDA 'Bill of Rights." 496 F.2d 1, 3-4.

The majority opinion in the Second Circuit case reached the same conclusion:

> "For the foregoing reasons, we join the Seventh Circuit and hold that, given the plain language of Section 101(a)(4)'s second proviso, 'an interested employer may not finance the institution of a suit by employees, but is free to finance a defense or a counterclaim.' Illinois Bell Telephone Co., 496 F.2d at 3." 350 F.3d 73, 86.

The Second and Seventh Circuits have concluded that an important protection granted to labor organizations by Congress, should be severely limited based on a "plain language" construction of the statute. This conflicts with other opinions and the intent of Congress.

In *Koolik v. Markowitz*, 40 F.3d 567 (2nd Cir. 1994), the Second Circuit, in a Per Curiam opinion, decided that "an answer that asserts a counterclaim against a plaintiff who

becomes a bankruptcy debtor is an 'action or proceeding against the debtor,' within the meaning of [section] 362(a)(1), notwithstanding the fact that the plaintiff initiated the lawsuit." 350 F.3d 73, 83. The *Koolik* Court "construed the provision broadly to further that statutory design and read 'the term "action or proceeding,' ... to include any pleading that asserts a claim on which relief is sough."350 F.3d 73. 83.

The majority opinion of the Second Circuit, in this case, decided that a broad construction was not warranted to effectuate the purposes of the statute. It adopted a narrow, literal, "plain language" construction of the second proviso. The majority opinion misconstrued the sweeping intent of the second proviso.

The intent of the second proviso was explained by an eminent District Judge in *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. National Right To Work Legal Defense and Education Foundation, Inc.*, 366 F.Supp. 46 (D.D.C. 1974). Although the case did not involve a counterclaim, it does provide a good discussion of the Congressional intent regarding the second proviso to 29 U.S.C. § 411(a)(4).

> "Congress was not unmindful of the potential for management interference in judicial disputes between worker and union. Congress therefor added a second proviso to the pertinent provision, subsection 101(a)(4), supra, concerning employee suits against labor organization." 366 F.Supp. 46, 48.
>
> "Under this proviso, interested employers are barred from financing or otherwise supporting Title I lawsuits brought by employees against

their unions." 366 F.Supp. 46, 48.

> "The statutory right of labor organizations to be free from workers suits financed directly or indirectly by interested employers is therefor clear and unambiguous." 366 F.Supp. 46, 48.

> "As a functional matter, the proviso serves to protect unions from harassing litigation and illegal management interference with their internal disputes with dissident workers." 366 F.Supp 46, 48.

The Court is respectfully requested to focus on what the proviso seeks to protect. District Judge Richey concluded that Congress intended "as a functional matter ... to protect unions from ... illegal management interference with their internal disputes with dissident workers." 366 F.Supp. 46, 48. Congress did not in any way intimate that it wished to exclude counterclaims from the sweep of the second proviso. The financing of a counterclaim by an interested employer is just as much management interference in a suit between a union and a member as would be the financing of a separate action by a member against a union.

The literal reading approach of the Seventh and Second Circuits miss the point. Forbidding the management financing of counterclaims would not interfere with an employee's ability to protect herself or of an employer's right to finance the defense of a member that is sued by a union. It is offense that is precluded. Bringing a counterclaim against the union is not defensive, it is offensive, and it projects the employer into the heart of intra-union affairs and politics, exactly the evil that Congress intended to prevent. In short, prohibiting counterclaims does not diminish the protection offered by Congress to union members, but does severely

diminish the protection offered by Congress to labor organizations.

The implication of the majority's reasoning is that by invoking the legal process, Local 38 is opening itself up to employer interference in its internal disputes. There is no warrant for this reasoning in the legislative history of the Labor-Management Reporting and Disclosure Act. The Second and Seventh Circuits, in effect, hold that it was the intent of Congress that if Local 38 goes to Court to enforce a fine, employer interference in Local 38's internal affairs is the price it should expect to pay.

The dissenting opinion in this case, 350 F.3d 73, 92-99, points out an unintended consequence of the majority holding. A literal construction of "to institute an action" actually reduces the protection offered to union members by Congress in addition to reducing the protection offered to labor organizations to be free of employer interference in their internal affairs. If counterclaims are excluded from the reach of 29 U.S.C. § 411(a)(4), then the statute may be read as allowing a union to discipline a member for bringing a counterclaim against his union, see 350 F.3d 73, 92-93.

The Second and Seventh Circuit "plain language" approach overturns a bedrock rule of Federal Practice. Claims asserted in a complaint are treated in exactly the same manner as claims in a counterclaim asserted in an answer. For example, upon a motion to dismiss, a District Judge will subject the claims in a counterclaim to the same criteria as the claims in a complaint.

> "It is well settled that a complaint should not be dismissed 'unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claims which would entitle him

> to relief.' Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); Maggette v. Dalsheim, 709 F.2d 800, 803 (2d Cir. 1983). Moreover, on a motion to dismiss, all factual allegations of the complaint must be accepted as true and construed favorably to the plaintiff. Cruz v. Beto, 405 U.S. 319, 322, 31 L. Ed. 2d 263, 92 S. Ct. 1079 (1972) (per curiam); Stewart v. Jackson & Nash, 976 F.2d 86, 87 (2d Cir. 1992). **These principles apply equally to a defendant's pleading asserting counterclaims**." (Emphasis supplied). *D.S. America (East), Inc. v. Chromagrafx Imaging Systems, Inc.*, 873 F.Supp. 786, 792 (E.D.N.Y. 1995).

There is no warrant in logic or in legislative history to treat an employer financed counterclaim against Local 38 any differently than an employer financed action against Local 38. To do so ignores the protections Congress sought to apply to labor organizations. Labor organizations throughout the United States can ill afford the loss of this important protection. They can ill afford this encouragement of unwarranted intrusions into their internal affairs.

2. The Court Should Grant Certiorari To Resolve Whether The Decision Below Conflicts With The Precedents Of This Court. The Court Should Resolve Whether Or Not Punitive Damages Are Constitutionally Permissible Under *State Farm Mutual V. Campbell*, 538 US. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003), When There Has Been No Economic Harm.

State Farm Mutual Automobile Insurance Company v. Campbell, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003), makes it clear that while punitive damages are

designed for retribution and deterrence, there are "due process" and procedural limits on such awards, 123 S. Ct. 1513, 1519 - 1520.

> "In light of these concerns, in *Gore, supra*, 517 U.S. 559, we instructed courts, reviewing punitive damages to consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. Id, at 575. We reiterated the importance of these three guideposts in *Cooper Industries* and mandated appellate courts to conduct de novo review of a trial court's application of them to the jury's award." 123 S. Ct. 1513, 1520.

It is the second criterion that is most relevant to this case. The Court declined to establish a set ratio between compensatory and punitive damages. However, the Court stated:

> "[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In *Haslip*, in upholding a punitive damages award, we concluded that an award or more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. 499 U.S., at 23-24. We cited that 4-to-1 ratio again in Gore. 517 U.S., at 581. The Court further referenced a long legislative history, dating

> back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. Id, at 581, and n. 33. While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, id., at 582, or, in this case, of 145 to 1." 123 S. Ct. 1513, 1524.

In this case, the ratio is 25,000- to- 1. The obvious conclusion is that where no economic harm has been suffered, punitive damages are constitutionally impermissible. Put this way, the proper examination is to focus on the economic harm to Pelella. The jury concluded that he suffered no economic harm. If he suffered no economic harm, it violates due process to impose a 25,000- to- 1 punitive damage ratio on Local 38.

> "In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." 123 S. Ct. 1513, 1524.

The Court below sought to avoid enforcement of this constitutionally mandated limitation by refusing to entertain the argument. The ground was that the issue was not raised with the District Court. 350 F.3d 73, 89-90.

Without discussing the wisdom of finding a waiver of an issue of constitutional proportion or whether there truly was a waiver, it was error for the panel majority to do so. A

purely legal issue may be raised for the first time on appeal.

> "In general, 'a federal appellate court does not consider an issue not passed upon below.' Singleton v. Wulff, 428 U.S. 106, 120, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976). See generally Robert J. Martineau, Considering New Issues on Appeal: The General Rule and the Gorilla Rule, 40 VAND. L. REV. 1023, 1026-34 (1987) (describing the historical development of this rule and the various justifications for it). This rule, however, is a prudential one, and we have broad discretion to consider issues not raised in the District Court. See Lo Duca v. United States, 93 F.3d 1100, 1104 (2d Cir. 1996); see also, e.g., Greene v. United States, 13 F.3d 577, 586 (2d Cir. 1994) ('Entertaining issues raised for the first time on appeal is discretionary with the panel hearing the appeal.'). It follows therefore that we have discretion to consider issues that were raised, briefed, and argued in the District Court, but that were not reached there." Booking v. General Star Management Co., 254 F.3d 313, 418 (2nd Cir. 2001).
>
> "We have such discretion even if an argument that is pressed on appeal was abandoned or waived in the District Court. See, e.g., Maska U.S., Inc. v. Kansa Gen. Ins. Co., 198 F.3d 74, 80 (2d Cir. 1999) (abandonment); DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818, 822 (2d Cir. 1997) (waiver)." 254 F.3d 313, 419.
>
> "Here, we will exercise that discretion for two

> reasons. First, the question of whether Texas or New York law is controlling is a purely legal issue. See Greene, 13 F.3d at 586 (reaching such an issue on appeal); see also Baker v. Dorfman, 239 F.3d 415, 420 (2d Cir. 2000) (noting that we have been 'more likely to exercise our discretion' to consider an issue not raised in the District Court 'where the issue is purely legal')." 254 F.3d 313, 419.

The reasoning of *Booking v. General Star Management Co., supra*, is particularly applicable here where it is difficult to see what useful arguments could have been raised before the District Court. The argument could not have been made to the District Court that the jury should have been instructed that punitive damages may not be granted in the absence of economic harm. Until *State Farm Mutual Automobile Insurance Company v. Campbell, supra*, that argument probably could not have been sustained. An instruction that the jury must consider the relationship between economic harm and punitive damages is not likely to have been very helpful to the jury, as this Court recognized in *State Farm Mutual Automobile Insurance Company v. Campbell, supra.* This Court has set forth a constitutionally sustainable ratio of four to one. That was done because the general statement of principles as set forth in previous cases had not achieved the desired result.

Finally, the Court below should have considered the punitive damage issue on the basis that a legal issue, particularly a constitutional issue, may be raised for the first time on appeal if it involves the effect of a subsequent decision of this Court that would be binding on the District Court, such that it doesn't matter whether or not the District Court had an opportunity to consider the issue, see *Selected Risk Ins. Co. v. Bruno*, 718 F.2d 67, 69 (3rd Cir. 1983).

The panel majority should have entertained Local 38's constitutional objection to the punitive damage award. The objection arises from this Court's opinion in *State Farm Mutual Automobile Insurance Company v. Campbell, supra,* which was decided on April 7, 2003, more than nine months after the District issued its amended judgment. This Court should require the Second Circuit to consider whether it is constitutionally permissible to allow a 25,000 to 1 ratio of punitive damages when there has been no economic harm.

3. The Court Should Grant Certiorari To Resolve A Conflict Between The Court Below And The Fourth Circuit. The Fourth Circuit Has Correctly Ruled That Punitive Damages Are Not An Appropriate Remedy Under The Labor - Management Reporting And Disclosure Act, Absent An Express Congressional Intention To Allow It.

In *Morrissey v. Curran*, 544 F.2d 19 (2nd Cir. 1976), the Second Circuit, reversing the District Court on this issue, initially approved punitive damages in an L.M.R.D.A. case, 29 U.S.C. § 401 *et seq.*, in three sentences.

> "(W)e see no justification for his ruling as a matter of law that the Union could not be held for punitive damages under the Landrum-Griffin Act. Section 102 is proof enough that Congress intended that labor organizations could be civilly liable for violating § 101. If punitive damages can be awarded against other defendants, they can be awarded against unions as well." 544 F.2d 19, 25.

The Fourth Circuit, in *United Mine Workers v. Patton,* 211 F.2d 742, 749 (4th Cir. 1954), cert. den., 348

U.S. 824, 78 S.Ct. 38, 99 L.Ed.2d 649 (1954), has ruled that punitive damages are not an appropriate remedy under the L.M.R.D.A., absent an express Congressional intention to allow it.

> "Where Congress has intended that damages in excess of the actual damage sustained by plaintiff may be recovered in an action created by statute, it has found no difficulty in using language appropriate to that end. Thus, in copyright cases, 17 U.S.C.A. 1, in patent cases 35 U.S.C.A. 284, and in anti-trust cases, 15 U.S.C.A. 15, the right to recover treble damages is expressly given. There is nothing in the language of the statute here under consideration, however, or in its history, that indicates that Congress intended that anything more than actual damages be recovered. In the Senate debate on the bill, Senator Taft said (93 Cong.Record 5060, Legislative History of Labor Management Relations Act. vol. 2, p. 1371):
>
> 'I think, since the sentiment of the Senate is against the injunctive process, I see no reason why suits of this sort should not be permitted to be filed. After all, it is only to restore to people, who lose something, because of boycotts and jurisdictional strikes, the money which they have lost.'
>
> Later in a colloquy with Senator Morse, who was insisting that the effect of the statute would be to inflict unconscionable punishment upon unions engaging in a boycott, and had argued that there was no

parallel in other statutes for imposing such liability, Senator Taft said (93 Cong.Record p. 5074, Legislative History of the Labor Management Relations Act vol. 2, p. 1398):

'The Senator asks for a parallel, and I can give him one. Under the Sherman Act the same question of boycott damage is subject to a suit for damages and attorneys' fees. In this case we simply provide for the amount of the actual damages.'

In the absence of anything in the act itself or in its history indicating an intention on the part of Congress to authorize the recovery of punitive damages by this highly controversial legislation, the courts would not be justified, we think, in construing it to permit such recovery. In Amazon Cotton Mill Co. v. Textile Workers Union of America, 4 Cir., 167 F.2d 183, 186, which dealt with the same statute, we quoted with approval the language of the Supreme Court in a case involving the Railway Labor Act, 45 U.S.C.A. 151 et seq., to the effect that, "The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate'. We are still of that opinion. In the light of the history of recent labor legislation, it is hardly conceivable that Congress could have intended to vest in the courts the power to punish unions by awards of punitive damages. Certainly, in the struggle over this act, which was vetoed by the President and passed by the Congress over his veto, no one

ever suggested, so far as we are advised, that punitive damages could be awarded under its provisions." 211 F.2d 742, 749-750.

CONCLUSION

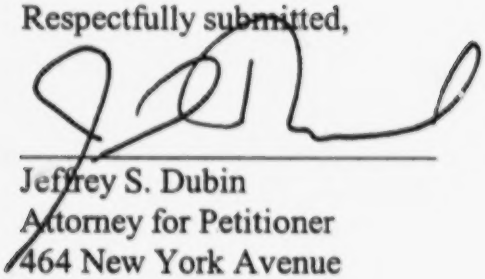
The Court should grant certiorari to resolve an issue of labor law that is of national importance. The Court should resolve whether or not the second proviso to 29 U.S.C. § 411(a)(4), section 101(a)(4) of the Labor Management Reporting and Disclosure Act, which bars an interested employer from financing the institution of a suit by an employee against his union, allows an interested employer to finance the assertion of a counterclaim by an employee against his union.

The Court should grant certiorari to resolve whether the decision below conflicts with the precedents of this court. The Court should resolve whether or not punitive damages are constitutionally permissible under *State Farm Mutual v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003), when there has been no economic harm. Alternatively, the Court should grant the petition, vacate the judgment below, and remand for reconsideration in light of this Court's decision in *State Farm Mutual v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003).

The Court should grant certiorari to resolve a conflict between the Court below and the Fourth Circuit. The Fourth Circuit has correctly ruled that punitive damages are not an appropriate remedy under the Labor - Management Reporting and Disclosure Act, 29 U.S.C. § 401 *et seq.*, absent an express Congressional intention to allow it.

Dated: Huntington, New York
April 16, 2004

Respectfully submitted,



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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2003

(Argued August 27, 2003

Decided November 17, 2003)

Docket No. 02-7939

LOCAL UNION NO. 38, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO,

Plaintiff-Counter-Defendant-Appellant,

—v.—

ANTHONY PELELLA,

Defendant-Counter-Plaintiff-Appellee.

Before:

MESKILL, MINER AND STRAUB,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Yanthis, *M.J.*, awarding defendant-appellee Anthony Pelella $1 in nominal damages, $25,000 in punitive damages, $30,213 in

attorney's fees, and $205.50 in costs on a counterclaim following a jury trial.

Affirmed. Judge Straub dissents in a separate opinion.

JEFFREY S. DUBIN, Huntington, NY, *for Appellant.*

CHRISTOPHER WATKINS, Chester, NY (Stephen Bergstein, Thornton, Bergstein & Ullrich, Chester, NY, of counsel), *for Appellee.*

MESKILL, *Circuit Judge*:

This appeal asks us to decide if section 101(a)(4) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(4), bars a union member's counterclaim that is financed by an interested employer as well as whether punitive damages are available where only nominal damages are awarded and whether attorney's fees were justified.

Plaintiff-appellant Local Union No. 38, Sheet Metal Workers' International Association, AFL-CIO (Local 38) appeals from a judgment of the United States District Court for the Southern District of New York, Yanthis, *M.J.*, entered after a jury trial. When Local 38 commenced an action against defendant-appellee Anthony Pelella (Pelella) to collect a fine levied during the course of an earlier union proceeding, Pelella asserted a counterclaim that accused Local 38 of breach of contract and violations of his due process rights.[1] A jury found in favor of Pelella

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[1] After the parties first asserted their respective claims, the litigation went forward before the district judge assigned to the case. In December 2000, the parties consented, pursuant to 28 U.S.C. § 636(c),

on his counterclaim and awarded him $1 in nominal damages and $25,000 in punitive damages. Thereafter, the district court awarded Pelella $30,213 in attorney's fees and $205.50 in costs.

On appeal, Local 38 contends that section 101(a)(4) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(4), bars a union member's counterclaim where that claim for relief is financed by an interested employer. Local 38 also argues that attorney's fees were not warranted, punitive damages were not available in the absence of an award of actual damages, and, in any event, the punitive damages awarded by the jury were grossly excessive.

For the reasons that follow, we conclude that section 101(a)(4) does not bar a counterclaim financed by an interested employer. We also hold that the district court did not abuse its discretion by awarding attorney's fees and that Local 38 has waived the remaining arguments. We therefore affirm.

BACKGROUND

I. *Union Proceedings*

This appeal is the byproduct of an internal union dispute. Several years ago, Pelella joined Local 38 as an apprentice member. In October 1998, Nicholas Colombo (Colombo), Local 38's Business Representative, filed charges of misconduct against Pelella. In those charges, Colombo accused his fraternal union brother of several violations of the Constitution and Ritual of the Sheet Metal Workers'

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to proceed before a magistrate judge. At that stage, the case was assigned to the Honorable George A. Yanthis, *M.J.*, for all further proceedings.

International Association and Affiliated Local Unions, State, District and Provincial Councils (the Constitution). According to Colombo, Pelella (a) had accepted substandard wages and benefits for work he performed for P & P Sheet Metal, Inc. (P & P), in excess of 40 hours with the full knowledge that benefits were not being paid to Local 38, (b) had failed to obtain an overtime permit for such work, and (c) had improperly received certain benefits.

Local 38 ordered Pelella to answer the charges before its Trial Committee. On November 4, 1998, Local 38's Executive Board, sitting as a Trial Committee (Committee), held Pelella's trial. The board members found Pelella guilty on all three charges and removed him from his employment with P & P. The Committee also imposed a $4,418 fine. However, the Committee mitigated the effect of that sanction by holding the fine in abeyance; the fine would only be reinstated if, in the future, a union Executive Board found Pelella guilty of an infraction of the Constitution.

Two weeks later, the Committee submitted its decision to the membership of Local 38. They voted unanimously to accept that decision. Thereafter, Pelella appealed to both the General President and the General Executive Council (Council) of the Sheet Metal Workers' International Association. The General President affirmed the Committee's verdict. In turn, the Council upheld the determinations of the General President and the Committee. The Council did, however, modify the Committee's decision in one pertinent respect; Pelella was informed that the fine, once held in abeyance, would now be collectible in full.[2]

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[2] At an unidentified stage during the union's appellate proceedings, Pelella parted ways with Local 38. The lean record before us does not definitively explain why this separation came about.

(*footnote continued on the following page*)

II. *Legal Proceedings*

After Pelella failed to pay the fine, Local 38 commenced an action, pursuant to section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, in the United States District Court for the Southern District of New York to collect the unpaid penalty. Pelella responded by asserting a counterclaim that alleged due process violations and breach of contract. According to Pelella, Local 38 breached the union's Constitution and violated his rights to due process of law when the union disciplined him without following certain procedures. In a similar vein, Pelella asserted, through various affirmative defenses, that he should not be liable for a fine that was the product of procedures that failed to comport with due process and the union's Constitution.

Local 38 moved for partial summary judgment. The union argued that section 101(a)(4) of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 411(a)(4), barred Pelella's counterclaim because the counterclaim had been financed by an interested employer. Pelella opposed Local 38's motion on several grounds. At the outset, Pelella argued that section 101(a)(4) did not prohibit counterclaims financed by inter-

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According to Pelella, Local 38 directed him to work for an employer in Stamford, Connecticut, some two hours from his home in Middletown, New York. When Pelella requested relief from this assignment, Local 38's President purportedly told him that he had the option of withdrawing. However, when Pelella tried to withdraw, Local 38 allegedly terminated him from the union for refusal to accept work.

Local 38 recalls the details of the separation somewhat differently. The union contends that it never took away Pelella's membership; to the contrary, Pelella supposedly allowed his membership to lapse when he dropped out of the apprenticeship program.

ested employers. In addition, Pelella explained that his counterclaim had not asserted the violation of any rights in contravention of the LMRDA; rather, the counterclaim was premised on violations of the Due Process Clause and breach of contract. Pelella therefore took the position that section 101(a)(4) of the LMRDA did not apply to his counterclaim. Finally, Pelella contended that the counterclaim had not been "financed" by an "interested employer" within the meaning of section 101(a)(4).

The district court did not address whether Pelella's counterclaim had been financed by an interested employer. Nor did the court examine the precise nature of Pelella's counterclaim or the bearing thereof on the application of section 101(a)(4). Instead, the court held that section 101(a)(4) did not prohibit an interested employer from financing a member's counterclaim against his union. Accordingly, the court denied Local 38's motion for partial summary judgment.

As the trial drew near, Pelella began to describe his counterclaim in a somewhat different fashion. Immediately prior to trial, he submitted proposed jury instructions that characterized his counterclaim as one brought for breach of contract and violations of his due process rights under the LMRDA.

What transpired during the two day trial that followed is far from clear. The parties have failed on appeal to introduce an adequate record of the jury instructions, evidence and legal arguments (including objections), if any, presented during the trial. At some stage, Local 38 apparently moved, pursuant to Rule 50(a) of the Federal Rules of Civil Procedure, for a directed verdict. The record does not reflect the exact grounds for that motion. Moreover, the jury apparently proceeded to consider both Local 38's

LMRA claim as well as Pelella's breach of contract and LMRDA allegations. In other words, the jury evaluated, *inter alia,* whether Local 38 had violated Pelella's due process rights under section 101(a)(5) of the LMRDA, 29 U.S.C. § 411(a)(5).[3]

On November 27, 2001, the jury returned a verdict in favor of Pelella with respect to Local 38's LMRA claim and on his counterclaim after they found that Local 38 had breached a contract and violated Pelella's due process rights under the LMRDA. It awarded Pelella $1 in nominal damages and $25,000 in punitive damages. The punitive damages award was predicated entirely on Local 38's violation of Pelella's LMRDA rights.

After the jury returned a verdict in Pelella's favor, Local 38 renewed its motion for judgment as a matter of law in accordance with Rule 50 and also moved, in the alternative, for a new trial pursuant to Rule 59. The union argued that Pelella could not recover punitive damages in the absence of an award of actual damages and that the evidence presented at trial was insufficient to warrant punitive damages.

The district court denied both motions. The court held that a party could recover punitive damages even in the absence of actual damages. The court also found that there was sufficient evidence from which a reasonable jury

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[3] Section 101(a)(5) of the LMRDA provides as follows:

> No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

29 U.S.C. § 411(a)(5).

could conclude that punitive damages were warranted and that the jury's verdict had been neither seriously erroneous nor a miscarriage of justice.

At the same time, the district court granted Pelella's motion for attorney's fees and costs. The court concluded that attorney's fees were justified because Pelella's victory conferred several common benefits on Local 38's members. Hence, the court awarded Pelella $30,213 in attorney's fees and $205.50 in costs.

The court issued an Amended Judgment on July 1, 2002.[4] This timely appeal followed.

DISCUSSION

I. *Standard of Review*

Local 38 appeals from the district court's denial of its motion for partial summary judgment as well as its motions for judgment as a matter of law and for a new trial. Local 38 also appeals the district court's decision to award Pelella attorney's fees and costs.

We review *de novo* the district court's denial of a motion for partial summary judgment, but we only undertake to do so when, as here, a final decision has rendered the case appealable. *See Travelers Insurance Co.* v. *Carpenter,* 313 F.3d 97, 102 (2d Cir. 2002); *S.E.C.* v. *Credit Bancorp, Ltd.,* 290 F.3d 80, 87 (2d Cir. 2002). We also review *de novo* the denial of a motion for judgment as a matter of law under Rule 50. *Wolf* v. *Yamin,* 295 F.3d 303, 308 (2d Cir. 2002). In contrast, we review for abuse of discretion the district court's denial of a motion for a new trial pursuant to Rule 59. *Smith* v. *Carpenter,* 316 F.3d 178, 183 (2d Cir.

[4] The court vacated the initial Judgment due to clerical error.

2003). The latter standard of review similarly applies when we examine a district court's decision to award attorney's fees. *Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC* v. *United States I.N.S.*, 336 F.3d 200, 203 (2d Cir. 2003).

II. *Interested Employers Financing Counterclaims Under The LMRDA*

A. *Section 101(a)(4) Of The LMRDA*

Local 38 contends that section 101(a)(4) of Title I of the LMRDA, 29 U.S.C. § 411(a)(4), bars an interested employer from financing a counterclaim brought by a union member against his union. We disagree.

Section 101(a)(4) provides, in pertinent part:

> No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding . . . : *Provided,* That any such member may be required to exhaust reasonable hearing procedures . . . within such organization, before instituting legal or administrative proceedings against such organization or any officer thereof: *And provided further,* That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

29 U.S.C. § 411(a)(4).

As the district court acknowledged, although the LMRDA was enacted in 1959, relatively few cases have addressed the scope of section 101(a)(4)'s second proviso. The majority of the cases that have analyzed the second proviso dealt with situations in which a union member affirmatively commenced a lawsuit against his union. *See, e.g. Harris* v. *Plasterers and Cement Masons Local No. 406,* 619 F.2d 1164, 1169-70 (7th Cir. 1980); *Adamszewski* v. *Local Lodge 1487, International Association of Machinists and Aerospace Workers, AFL-CIO,* 496 F.2d 777, 780-84 (7th Cir. 1974); *Colapietro* v. *International Association of Machinists and Aerospace Workers, District 64,* 611 F.Supp. 90, 94-96 (D.R.I. 1985); *Farowitz* v. *Associated Musicians of Greater New York, Local 802, A.F. of M.,* 241 F.Supp. 895, 908-09 (S.D.N.Y. 1965). Only one decision has reviewed the second proviso's application to a counterclaim.

In *International Brotherhood of Electrical Workers, Local 336* v. *Illinois Bell Telephone Co.,* 496 F.2d 1 (7th Cir. 1974), the Seventh Circuit squarely addressed the precise issue before us. There, a union initiated a lawsuit to collect fines levied against union members. *Id.* at 2. In response, the defendants sought to recover installment payments they had already made towards the fine by filing a counterclaim. *Id.* The union asserted that an interested employer had financed the counterclaim and argued that section 101(a)(4) barred the defendants' counterclaim under those circumstances.

The Seventh Circuit disagreed. On examining section 101(a)(4), the court explained that "the language Congress chose prohibits the financing of 'any such action,' which refers back to the right of a member 'to institute an action in any court.' " *Id.* at 3. The Seventh Circuit held that it

could "only presume that Congress meant what it said, that an interested employer may not finance the institution of a suit by employees, but is free to finance a defense or a counterclaim." *Id.*

The Seventh Circuit's rationale is persuasive in light of the plain language of section 101(a)(4). When we construe a statute, we first look to the language of the statute itself so as to ascertain the provision's plain meaning, if it has one. *Auburn Housing Authority* v. *Martinez,* 277 F.3d 138, 143 (2d Cir. 2002); *United States* v. *Dauray,* 215 F.3d 257, 260 (2d Cir. 2000). As the Seventh Circuit noted in *Illinois Bell Telephone Co.,* section 101(a)(4)'s second proviso precludes interested employers from financing "any such action," a phrase that refers back to and limits a member's right to "*institute* an *action* in any court." 29 U.S.C. § 411(a)(4) (emphasis added).

The word "action," without more, is arguably broad enough to encompass any type of judicial proceeding, including counterclaims. *See United States* v. *P. F. Collier & Son Corp.,* 208 F.2d 936, 938 (7th Cir. 1954) ("If the question were one of first impression, we would have no difficulty in reaching the conclusion that the words 'any action, suit or proceeding' are sufficiently broad in their ordinary and commonly accepted meaning to encompass every form and kind of litigation."); *see also Black's Law Dictionary* 28-29 (7th ed. 1999) (defining an "action" as, *inter alia,* "[a] civil or criminal judicial proceeding"). *Cf.* U.C.C. § 1-201(1) (" 'Action' in the sense of a judicial proceeding, includes recoupment, counterclaim, set-off, suit in equity, and any other proceeding in which rights are determined.").

We need not decide, however, whether the word "action," standing alone, embraces Pelella's counterclaim for

the purposes of section 101(a)(4)'s second proviso. "[T]he meaning of statutory language, plain or not, depends on context." *King* v. *St. Vincent's Hospital,* 502 U.S. 215, 221 (1991). In the statutory context of section 101(a)(4), the word "action" is qualified by the phrase "to institute."

A party institutes an action when he commences a judicial proceeding. *See Black's Law Dictionary, supra,* at 801 (defining the verb "institute" as "[t]o begin or start; commence"); *see also McNeil* v. *United States,* 508 U.S. 106, 112 (1993) ("[T]he normal interpretation of the word 'institute' is synonymous with the words 'begin' or 'commence.' "). A party commences a judicial proceeding when he takes the first step that invokes the judicial process. *See Black's Law Dictionary* 183 (6th ed. 1991) (defining "commence" as "[t]o initiate by performing the first act or step; [t]o begin, institute or start"); *see also United States* v. *$8,221,877.16 in United States Currency,* 330 F.3d 141, 159 (3d Cir. 2003) (quoting *McNeil,* 508 U.S. at 112) ("In the context of civil actions, the word 'commence' does not encompass broad concepts, but rather requires 'invocation of the judicial process.' ").

An action is therefore instituted when a plaintiff files a complaint as that constitutes the first step invoking the judicial process. *See* Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court."); Fed. R. Civ. P. 3 advisory committee's note ("[T]he first step in an action is the filing of the complaint."). In sharp contrast, a defendant asserts a counterclaim in response to a plaintiff's institution of an action. A counterclaim, by definition, is a "claim for relief asserted against an *opposing party after* an *original* claim has been made." *Black's Law Dictionary* 353 (7th ed. 1999) (emphasis added); *see also* 3 James Wm. Moore, *et al., Moore's Federal Practice*

§ 13.90[2][a], at 13-79 (3d ed. 1997) ("Only defending parties may assert counterclaims."). Counterclaims are therefore "generally asserted in the answer" to a previously filed complaint. Moore, *supra,* § 13.92, at 13-88.

In other words, a defendant does not "institute" an action when he asserts a counterclaim. Rather, a plaintiff must commence the action by filing a complaint that names a defendant. This affords the defendant the ability to file a responsive pleading, namely the answer, *see* Fed. R. Civ. P. 12(a), in which he can include a claim for relief against the opposing party. *See* Fed. R. Civ. P. 13(a), 13(b). Since section 101(a)(4)'s second proviso limits a union member's right to "institute an action," the plain language of the statutory text, when read literally, does not circumscribe a member's right to pursue a counterclaim because the assertion of a counterclaim does not "institute an action." *See Illinois Bell Telephone Co.,* 496 F.2d at 4.

B. *Legislative History*

Local 38 contends that, notwithstanding the plain language of section 101(a)(4), we should construe the second proviso broadly and prohibit interested employers from financing the counterclaims of union members so as to effectuate congressional intent. That argument is not without force. We have previously read similar language broadly to encompass counterclaims where doing so furthered the purpose of the statute in question. *See Koolick* v. *Markowitz,* 40 F.3d 567, 568-69 (2d Cir. 1994). "[W]ords are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how clear the words may appear on superficial examination." *Harrison* v. *Northern Trust Co.*, 317 U.S. 476, 479 (1943) (internal citations and

quotation marks omitted). The words chosen by Congress "are not in all instances a reliable indicator of Congress' intent, [and] we may look to the legislative history of the enactment to determine whether literal application of the statute would pervert its manifest purpose." *United States* v. *Perdue Farms,* 680 F.2d 277, 280 (2d Cir. 1982) (internal citations and quotation marks omitted).

In *Koolick* v. *Markowitz,* 40 F.3d at 568, we addressed the scope of 11 U.S.C. § 362(a)(1) and held that the provision operated to stay "the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor" where a petition in bankruptcy had been filed. 11 U.S.C. § 362(a)(1). The plaintiff in *Koolick* had appealed from a judgment that awarded the defendant $110,000 on his counterclaim. After the plaintiff subsequently filed a petition in bankruptcy during the course of the pending appeal, he argued that further appellate proceedings should be held in abeyance in accordance with section 362(a)(1). We agreed. On examining that provision, we noted that section 362(a)(1) had been "designed to provide the debtor with a breathing spell from his creditors." *Koolick,* 40 F.3d at 568 (internal citations and quotation marks omitted). We therefore construed the provision broadly to further that statutory design and read "the term 'action or proceeding,' for purposes of [section] 362(a)(1), to include any pleading that asserts a claim on which relief is sought." *Id.* Hence, we concluded that "an answer that asserts a counterclaim against a plaintiff who becomes a bankruptcy debtor is an 'action or proceeding against the debtor,' within the meaning of [section] 362(a)(1), notwithstanding the fact that the plaintiff initiated the lawsuit." *Id.* Section 362(a)(1) thus operated

to stay the continuation of the appellate proceedings in *Koolick*.

The rationale that led us to construe section 362(a)(1) broadly does not apply in this instance. Construing section 101(a)(4) broadly to preclude a union member from asserting a counterclaim financed by an interested employer where the union instituted an action against the member would not further the purpose of the LMRDA.

Congress enacted the LMRDA "to correct widespread abuses of power and instances of corruption by union officials." *Franza* v. *International Brotherhood of Teamsters, Local 671*, 869 F.2d 41, 44 (2d Cir. 1989). "The legislative history and the extensive hearings which preceded the enactment of the [LMRDA] abundantly evidence the intention of the Congress to prevent union officials from" abusing their disciplinary powers. *Salzhandler* v. *Caputo*, 316 F.2d 445, 449 (2d Cir. 1963).

Section 101 of Title I of the LMRDA represents "[o]ne of the most significant remedial provisions of the LMRDA." *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America* v. *National Right to Work Legal Defense and Education Foundation*, 590 F.2d 1139, 1149 (D.C. Cir. 1978) *(National Right to Work)*. Title I, which sets out a "Bill of Rights" for union members, was written to protect those members from the abusive or coercive practices of the union's leadership. *Franza*, 869 F.2d at 44. Among the rights included in section 101 of Title I "is the right of a union member to bring an action against his union and its leaders in court or before an administrative agency." *National Right to Work*, 590 F.2d at 1149 (citing 29 U.S.C. § 411(a)(4)). "The right-to-sue provision was designed to give union members the

tools to insure the effective and fair operation of their union as a representative institution." *Id.*

The rights enumerated in Title I, however, are not without qualifications. The second proviso in section 101(a)(4) limits a member's right to institute an action against his union where the action is financed by an interested employer. *See* 29 U.S.C. § 411(a)(4).

As originally introduced by Senator McClellan in an amendment to the LMRDA, Title I did not include the second proviso. *See Adamszewski,* 496 F.2d at 782. Rather, the proviso "was offered in the Senate as an amendment to the right-to-sue provision of the bill of rights proposed by Senator McClellan." *National Right to Work,* 590 F.2d at 1149. The so-called Kuchel amendment, which did not refer to "interested" employers, initially provided:

> That no employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

105 Cong. Rec. 6693 (1959), *reprinted in* 2 NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959,* at 1220-21 (1959). That amendment, introduced by Senator Kuchel, sought "to eliminate the extremes raised by the [McClellan] amendment and to ensure that Title I would not unduly harass and obstruct legitimate unionism." *Franza,* 869 F.2d at 44 (internal citations and quotation marks omitted).

Although Congress "desired to preclude potentially harmful employer involvement in union-member suits against unions," it did not want "to prevent union members from using money obtained from friends, banks, or other similar sources to finance such suits." *National Right to*

Work, 590 F.2d at 1149-50. This concern led Congress to later add the adjective "interested" to "describe those employers or employer associations whose financing was to be prohibited." *Id.* at 1150; *see also Adamszewski*, 496 F.2d at 782-83.

The purpose of the second proviso in section 101(a)(4) was "to protect unions from harassing litigation and illegal management interference with their internal disputes with dissident workers." *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America* v. *National Right to Work Legal Defense and Education Foundation*, 366 F.Supp. 46, 48 (D.D.C. 1974); *International Union of Operating Engineers Local 400, AFL-CIO (Hilde Construction Co.)*, 225 N.L.R.B. 596, 606 (1976), *mem. aff'd*, 561 F.2d 1021 (D.C. Cir. 1977); *see also National Right to Work*, 590 F.2d at 1149 (Section 101(a)(4)'s second proviso "was designed to keep employer influence out of disputes between union members and their unions."). In essence, "Congress wanted to deny employers the power to cause harassing suits or otherwise to create divisions in the unions with which they had relationships." *National Right to Work*, 590 F.2d at 1151.

The concerns that section 101(a)(4)'s second proviso seeks to address have less force where, as here, a union affirmatively subjects an internal union dispute to litigation in a court of law. By taking the member to court, the union itself introduces the outside actor into what once had been an internal grievance and opens the door to some measure of interference. Moreover, to the extent that the second proviso seeks to deny interested employers the power to "cause harassing suits" or "create divisions" between the union and its members, that concern is mitigated where the union has already initiated legal action

against one or more of its members. If anything, denying members the ability to secure resources from interested employers so that they can protect themselves under these circumstances—where the union invokes judicial assistance to enforce disciplinary charges and the fines that result therefrom—may leave the members vulnerable to the same abuses of union power that the LMRDA seeks to remedy.

In evaluating these considerations and their bearing on the plain statutory language before us, we must keep in mind that the text at issue here is a proviso. "It is an established rule of statutory construction that a proviso states an exception from the general policy which a law embodies, and should be strictly construed and so interpreted as not to destroy the remedial processes intended to be accomplished by the enactment." *Shilkret* v. *Musicraft Records,* 131 F.2d 929, 931 (2d Cir. 1942).[5] We hold that a narrow construction of the second proviso is warranted; that narrow interpretation better comports with Title I's purpose of protecting union members from abusive union practices and, at the same time, does not undermine the intent of the second proviso.

The dissent contends that construing the second proviso in a narrow fashion undermines the goals of the LMRDA because our construction also bears on the meaning of the phrase "to institute an action" as those words are used in the main body of section 101(a)(4). According to the dissent, strictly construing the second proviso not only affects the extent to which interested employers can fund a mem-

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[5] In sharp contrast, *Koolick* turned on an interpretation of 11 U.S.C. § 362(a). Section 362(a) "generally must be construed broadly." *Checkers Drive-In Restaurants* v. *Commissioner of Patents and Trademarks,* 51 F.3d 1078, 1082 (D.C. Cir. 1995).

ber's counterclaim but also circumscribes the protection afforded by section 101(a)(4) to a union member's right to sue. The dissent seeks to support that conclusion by aguing that, if we read the phrase "to institute an action" as it is incorporated by reference in the second proviso in a literal manner, we must also read those same words literally when they are used in the main body of section 101(a)(4), which prohibits labor organizations from "limit[ing] the right of any member thereof to institute an action." 29 U.S.C. § 411(a)(4). Because the phrase "to institute an action," when read literally, means to commence an action through the filing of a complaint, the dissent suggests that our strict interpretation of those words would narrow the scope of the rights guaranteed by the main body of section 101(a)(4) by allowing unions to limit the rights of their members to assert a counterclaim.

However, that issue is not implicated in this appeal. In this appeal, we are asked to focus on the narrower question of whether section 101(a)(4)'s second proviso precludes a union member from pursuing a counterclaim that is financed by an interested employer. As Justice Frankfurter noted, an "exact formulation of the issue before us is necessary to avoid inadvertent pronouncement in one context when the language may require separate considerations in other settings." *Automatic Canteen Co. of America* v. *F.T.C.*, 346 U.S. 61, 65 (1953) (Frankfurter, *J.*).

Furthermore, the history of LMRDA litigation undercuts the concerns expressed by the dissent. Although the LMRDA was enacted in 1959, we are aware of no cases in which a union has argued that the text set forth in the main body of section 101(a)(4) allows a union to limit the rights of its members to assert a counterclaim. This is telling with respect to how section 101(a)(4) has been understood in

the nearly 30 years since the Seventh Circuit held that the phrase "to institute an action," as those words were referred to in the second proviso, did not encompass the assertion of a counterclaim. *See Illinois Bell Telephone Co.*, 496 F.2d at 3-4. In the decades after the Seventh Circuit arrived at that decision, there is no record of a single court holding that unions could limit the rights of their members to assert counterclaims against them in light of the terminology employed by section 101(a)(4). In essence, despite the fears expressed by the dissent, there is no persuasive evidence to suggest that parties and courts believe unions may limit the rights of their members to assert counterclaims.

For the foregoing reasons, we join the Seventh Circuit and hold that, given the plain language of section 101(a)(4)'s second proviso, "an interested employer may not finance the institution of a suit by employees, but is free to finance a defense or a counterclaim." *Illinois Bell Telephone Co.*, 496 F.2d at 3.[6] Accordingly, we hold that the district court properly denied Local 38's motion for partial summary judgment.

III. *Pelella's Inconsistent Characterizations Of His Counterclaim*

After Local 38 initiated this lawsuit to recover a $4,418 fine, Pelella responded by asserting a counterclaim in which he alleged, among other things, that the union had violated his due process rights when it disciplined him without following certain procedures. When Pelella

[6] Because we conclude that section 101(a)(4)'s second proviso does not bar counterclaims financed by interested employers, we do not decide whether an interested employer financed Pelella's counterclaim.

answered Local 38's complaint, he did not specify the source of those due process rights.

Local 38 eventually moved for partial summary judgment, arguing that his counterclaim was barred by section 101(a)(4) of the LMRDA. Pelella opposed the union's motion on several grounds. One in particular stands out.

In the opposition brief he filed with the district court, Pelella argued that section 101(a)(4) did not apply to his claim for relief because the counterclaim was premised on violations of the Due Process Clause, not the LMRDA. He apparently took that position in an effort to escape the reach of section 101(a)(4). Although we have never decided the issue, various courts have held that section 101(a)(4) of the LMRDA does not preclude union members from pursuing claims financed by interested employers where those claims were properly brought under statutes other than the LMRDA. *See, e.g., Simo* v. *Union of Needletrades, Industrial & Textile Employees, Southwest District Council,* 322 F.3d 602, 612 (9th Cir.), *cert. denied,* ___-U.S. ___, 124 S.Ct. 224 (2003); *Adamszewski,* 496 F.2d at 784-85.[7]

Despite his earlier statements denying that the LMRDA served as a basis for his counterclaim, Pelella later submitted jury instructions premised on a surprising theory of relief: violations of his due process rights under the LMRDA. A trial soon followed and the jury returned a verdict in Pelella's favor. The jury found that Local 38 had breached a contract and violated Pelella's rights under the

[7] We cite these cases to illustrate why Pelella initially sought to distance himself from the due process rights enumerated in the LMRDA. We do not mean to suggest that we agree, or disagree, with the manner in which these decisions construed the reach of section 101(a)(4). That issue is not before us and we decline to address it.

LMRDA. It awarded Pelella $1 in nominal damages and $25,000 in punitive damages. However, the latter award rested solely on Local 38's violation of the LMRDA.

We need not decide what effect, if any, Pelella's inconsistent characterizations of his counterclaim had on the trial and verdict. First, the meager record before us does not suggest that Local 38 objected to Pelella's jury instructions. A party that "fails to object to a jury instruction at trial waives the right to make that instruction the basis for an appeal." *Fogarty* v. *Near North Insurance Brokerage,* 162 F.3d 74, 79 (2d Cir. 1998).

Moreover, Local 38 did not provide us with a transcript of the trial, including those portions that relate to the jury instructions. As the appellant, Local 38 bore the burden of ordering the trial transcripts which were necessary for this appeal. *See Wrighten* v. *Glowski,* 232 F.3d 119, 120 (2d Cir. 2000) (citing Fed. R. App. P. 10(b)(2)); see *also Meroney* v. *Delta International Machinery Corp.,* 18 F.3d 1436, 1437 (8th Cir. 1994). Local 38's failure to append the transcript prevents meaningful appellate review of the jury instructions. *Cf. Wrighten,* 232 F.3d at 120. We therefore decline to consider whether the LMRDA jury instructions were proper. *See Harris Market Research* v. *Marshall Marketing and Communications,* 948 F.2d 1518, 1528 (10th Cir. 1991); *see also King* v. *Unocal Corp.,* 58 F.3d 586, 588 (10th Cir. 1995).

Finally, Local 38 does not contend, on appeal, that Pelella's initial allegations regarding the nature of the due process violations in his counterclaim warrant reversal or vacatur. By failing to raise the issue on appeal, the argument is deemed waived. *ABB Industrial Systems* v. *Prime Technology,* 120 F.3d 351, 360 n.5 (2d Cir. 1997).

IV. *Punitive Damages*

A. *Insufficient Evidence*

After Local 38 appealed the judgment below, the union initially argued that the jury's punitive damages award was not supported by sufficient evidence. At oral argument, the union expressly abandoned that contention. We therefore need not address that claim.

B. *Availability Of Punitive Damages*

The jury awarded Pelella $1 in nominal damages and $25,000 in punitive damages. Local 38 contends that Pelella may not recover punitive damages in the absence of an award of actual damages.

In *Cush-Crawford* v. *Adchem Corp.*, 271 F.3d 352, 359 (2d Cir. 2001), we held that, in cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, punitive damages may be awarded regardless of whether a plaintiff also receives an award of compensatory or nominal damages. Local 38 argues that *Cush-Crawford* does not apply to punitive damages awarded for violations of the LMRDA. However, our decision in *King* v. *Marci*, 993 F.2d 294, 298 (2d Cir. 1993), precludes Local 38 from advancing this argument on appeal.

In *King*, the appellants challenged a punitive damages award where the jury did not award compensatory damages. 993 F.2d at 297. Yet, at trial, the defendants failed to object when the district court told the jury that it could award punitive damages regardless of whether the plaintiff had established actual damages. *Id.* Therefore, we held that, to whatever extent the appellants' arguments regarding punitive damages had merit, that position "cannot be imposed to alter the award of a jury that was explicitly

told, *without objection,* that it could make a punitive award without any compensatory award." *Id.* (emphasis added).

In this instance, as in *King,* the district court instructed the jury that it could award punitive damages even if the jury found that Pelella failed to establish actual damages. At oral argument, Local 38 conceded that the union did not object to the instruction. In the absence of such an objection, Local 38, like the appellants in *King,* may not seek to alter the jury award by arguing that punitive damages cannot be recovered in the absence of actual damages.

C. *Excessive Punitive Damages*

"Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW of North America* v. *Gore,* 517 U.S. 559, 568 (1996). Nonetheless, the Constitution places certain limits on the amount of punitive damages that may be imposed. *See Cooper Industries* v. *Leatherman Tools Group,* 532 U.S. 424, 433 (2001). "The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm Mutual Automobile Insurance Co.* v. *Campbell,* ___ U.S. ___, 123 S.Ct. 1513, 1519-20 (2003). "To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *Id.* at 1520.

On appeal, Local 38 argues that the jury's punitive damages award violated the Due Process Clause because the award exceeded Pelella's nominal damages by a 25,000-to-1 ratio. The union raised this argument in a reply brief during the course of this appeal after the Supreme Court decided *Campbell.* In *Campbell,* the Supreme Court refused "to impose a bright-line ratio which a punitive

damages award cannot exceed." *Id.* at 1524. However, the Court also explained that, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* at 1524. According to Local 38, the ratios discussed in *Campbell* preclude an award of punitive damages where a plaintiff recovers no actual damages and $1 in nominal damages.

As an initial observation, we note that the ratios referred to in *Campbell* may not apply with equal force when punitive damages are compared to nominal damages. The *Campbell* Court discussed significant disparities between "punitive and *compensatory* damages." *Id.* at 1524 (emphasis added). However, we previously have held that those types of ratios do not necessarily control where punitive and compensatory damages are awarded but the compensatory damages are nominal in nature. *Lee* v. *Edwards,* 101 F.3d 805, 811 (2d Cir. 1996); *cf. Williams* v. *Kaufman County,* 343 F.3d 689, 711 n.75 (5th Cir. 2003) (concluding that the *Campbell* ratios were inapposite where, among other things, the ratio at issue concerned nominal and punitive awards); *Edwards* v. *Jewish Hospital of St. Louis,* 855 F.2d 1345, 1352 (8th Cir. 1988) (refusing to hold that punitive damages must bear a reasonable relationship to the amount of nominal damages since the application of "the proportionality rule to a nominal damages award would invalidate most punitive damages awards because only very low punitive damages awards could be said to bear a reasonable relationship to the amount of a nominal damages award").

Lee instructs that where compensatory damages are nominal, "a much higher ratio can be contemplated while maintaining normal respiration." 101 F.3d at 811; *cf.*

Provost v. *City of Newburgh*, 262 F.3d 146, 164 (2d Cir. 2001) (noting that a $10,000 punitive damages award based on a $1 nominal damages award could be deemed consistent with constitutional constraints). In *Lee*, we held that the use of a multiplier did not serve as the best available tool for the assessment of punitive damages where the compensatory damages were nominal. *Lee*, 101 F.3d at 811. Instead, we examined punitive awards in similar cases to find the appropriate limits and proportions. *Id. Cf. DiSorbo* v. *Hoy*, 343 F.3d 172, 187 (2d Cir. 2003) (concluding that the use of a multiplier to assess punitive damages was not the best tool where "the jury awarded only nominal compensatory damages, yielding a staggering 650,000-to-1 ratio of punitive damages to compensatory damages").

Notwithstanding these observations, we need not decide whether the punitive damages here were grossly excessive in violation of the Due Process Clause. On the face of the record before us, Local 38 never raised this argument with the district court.[8]

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[8] By "the record," we refer informally in this instance to both the original papers and exhibits filed in the district court, *see* Fed. R. App. P. 10(a)(1), as well as to the information included in the joint appendix and the supplemental appendix. That record, however, is sparse. We therefore acknowledge that Local 38 may have raised an excessive punitive damages challenge with the district court during oral arguments for which we have no transcript or in documents such as briefs or letters that were not included in the record. Even assuming this is true, we, once again, have no means by which to meaningfully review arguments raised in this manner, if any, because Local 38 failed to provide us with such transcripts, briefs, or letters in an appendix. To the extent that Local 38 raised a due process challenge to the punitive damages award in the court below in materials or oral arguments outside the record, we decline to review the issue in the absence of a transcript or other documentation which would allow us meaningfully to evaluate the nature and scope of that challenge. *Cf. Wrighten*, 232 F.3d at 120.

Where a party contends that a punitive damages award is excessive, that issue is ripe for legal challenge after a verdict is entered. *See Tronzo* v. *Biomet, Inc.*, 236 F.3d 1342, 1348-49 (Fed. Cir. 2001). For that reason, excessive punitive damages that violate the Due Process Clause can be challenged through post-trial motions. *See, e.g. Rivera-Torres* v. *Ortiz Velez*, 341 F.3d 86, 101-02 (1st Cir. 2003); *Zhang* v. *American Gem Seafoods*, 339 F.3d 1020, 1042 (9th Cir. 2003).

"We generally will not review a party's contention that the damages award is excessive or insufficient where the party has failed to allow the district court to rule on the matter." *O'Connor* v. *Huard*, 117 F.3d 12, 18 (1st Cir. 1997); *see also Rivera-Torres*, 341 F.3d at 102; *Total Petroleum* v. *Davis*, 788 F.2d 476, 483 (8th Cir. 1986); *Carlton* v. *H.C. Price Co.*, 640 F.2d 573, 577 (5th Cir. 1981). After the jury returned a verdict in Pelella's favor, Local 38 moved for judgment as a matter of law pursuant to Rule 50 and for a new trial pursuant to Rule 59. However, in those motions, the union never argued that the punitive damages award was constitutionally excessive. Local 38 therefore failed to preserve that challenge for appellate review. *See Rivera-Torres*, 341 F.3d at 102.

Local 38's basing its due process challenge on a recent Supreme Court case decided during the course of this appeal does not lead us to a contrary conclusion. Despite the Supreme Court's references to particular ratios in *Campbell*, the Court also discussed applicable ratios before Local 38 instituted this lawsuit. For example, in *Gore*, the Court examined the disparity between punitive and compensatory damages where the punitive damages award was 500 times greater than the compensatory damages award. The Court held that, when the ratio between these awards

was "a breathtaking 500 to 1, . . . the [punitive damages] award must surely 'raise a suspicious judicial eyebrow.' " *Gore,* 517 U.S. at 583 (internal citations omitted). If anything, the 145-to-1 ratio subsequently discussed in *Campbell* paled in comparison. See *Campbell,* 123 S.Ct. at 1524.

Here, as Local 38 points out, punitive damages exceed nominal damages by 25,000 to 1. Setting aside the merits, if any, of the argument, Local 38 could unquestionably have invoked *Gore* in the district court proceedings to suggest that the jury's punitive award was constitutionally excessive. The Court's *Campbell* decision buttressed the ratios discussed in *Gore* but was not a necessary predicate for a due process challenge. Local 38 failed to raise such a challenge with the court below and the argument is therefore deemed waived. *See Anthony* v. *City of New York,* 339 F.3d 129, 136 n.3 (2d Cir. 2003).

V. *Attorney's Fees*

After the jury returned a verdict in his favor, the district court awarded Pelella $30,213 in attorney's fees and $205.50 in costs and disbursements. On appeal, Local 38 contends that the court erred by doing so because Pelella's victory did not provide a common benefit to the union's members.

Union members who succeed in vindicating rights guaranteed them by section 101 of the LMRDA may recover attorney's fees when the effect of the attorney's services has been to benefit the union and all of its members. *Rosario* v. *Amalgamated Ladies' Garment Cutters' Union, Local 10, I.L.G.W.U.,* 749 F.2d 1000, 1004 (2d Cir. 1984). This principle derives from *Hall* v. *Cole,* where the Supreme Court held that an award of attorney's fees to a

successful plaintiff who prevails on an LMRDA claim and thereby vindicates his rights "is consistent with both the [LMRDA] and the historic equitable power of federal courts to grant such relief in the interests of justice." 412 U.S. 1, 14 (1973). According to the Court, the rule constitutes an extension of the "common benefit" doctrine of *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), which permits an award of attorney's fees where "the plaintiff's successful litigation confers 'a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionally among them.' " *Hall*, 412 U.S. at 5 (quoting *Mills*, 396 U.S. at 393-94).

Although the jury did not award Pelella compensatory damages and he never formally sought equitable relief to remedy the inadequate disciplinary procedures he faced, those considerations are not dispositive of whether attorney's fees are warranted under the LMRDA. A union member "need not recover compensatory damages from the union in order to be entitled to a fee award." *Cruz* v. *Local Union No. 3 of the International Brotherhood of Electrical Workers*, 34 F.3d 1148, 1159 (2d Cir. 1994). Nor does the absence of equitable relief preclude such an award. *See Rodonich* v. *Senyshyn*, 52 F.3d 28, 31, 33 (2d Cir. 1995). Furthermore, the aggrieved member's recovery of money damages from the union does not foreclose a fee award as the damages may potentially confer substantial, albeit intangible and indirect, benefits on other union members. *See id.* at 33. Such damages "can serve as a check on the [union's] abuse of power and can promote the exercise of democratic rights by the rank and file." *Id.*

"Whether or not an LMRDA plaintiff deserves an attorney's fee award is a factual determination that rests squarely within the district court's discretion." *Id.* (internal citations and quotation marks omitted). The district court, rather than an appellate court, "is in a better position . . . to appraise the need for and potential benefits derived from the attorney's services, based on the judge's personal observation of counsel's performance and his intimate familiarity with the case." *Rosario,* 749 F.2d at 1004. The factual determinations of the district court are particularly important where, as here, the record on appeal offers little information about the LMRDA violations and the appellant has chosen not to append the trial transcript to the record so as to facilitate appellate review.

Here, Pelella argued that Local 38's disciplinary charges against him, and the disciplinary procedures that ensued therefrom, failed to comply with his rights to due process under the LMRDA. The jury returned a verdict in his favor on this due process counterclaim. On appeal, the union concedes, as it did below, that the charges and procedures to which Local 38 subjected Pelella reflect, at the very least, negligent compliance with the due process rights guaranteed by the LMRDA.

The district court determined that the jury's verdict against Local 38 recognized that the union's procedures and charges deprived Pelella of his due process rights. The court therefore found that Pelella's victory in the wake of his experience would result in several benefits to Local 38's membership. According to the court, a member of Local 38 faced with disciplinary charges would now receive notice of his procedural rights at a union trial. The court also thought it likely that the union would now select impartial members for its trial committees. Moreover, the

court found that Pelella's vindication of his rights would prove beneficial to the members because the charges directed at him were similar to the other charges brought by the union.

We agree with the district court that these considerations justified an award of attorney's fees under the LMRDA. A district court does not abuse its discretion when the court awards attorney's fees under the LMRDA where, as here, the member's vindication of his rights "had the *potential effect* of deterring the union from denying members their due process procedural rights guaranteed by [section] 101 of [the] LMRDA and of encouraging union members to enforce those rights." *Rosario,* 749 F.2d at 1006 (emphasis added). The verdict against Local 38 confers a common benefit to its members because it will likely "increase the [union's] sensitivity to the full and fair hearing rights of its members." *Bollitier* v. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers,* 735 F.Supp. 612, 622 (D.N.J.), *mem. aff'd,* 888 F.2d 1379 (3d Cir. 1989).

In addition, where the charges of misconduct directed at Pelella were themselves inadequate, Pelella's victory will likely dispel the "chill" cast on the rights of other members who face similar inadequate charges. *See Hall,* 412 U.S. at 8 ("[B]y vindicating his own right, the successful litigant dispels the 'chill' cast upon the rights of others."). Hence, the district court did not abuse its discretion when the court awarded attorney's fees and costs.

CONCLUSION

For the foregoing reasons, we affirm the orders of the district court which denied Local 38's motion for partial

summary judgment, motion for judgment as a matter of law, and motion for a new trial. We also affirm the district court's decision to award Pelella attorney's fees and costs.

Costs to the defendant-appellee.

STRAUB, *Circuit Judge*, dissenting:

The majority construes the phrase "to institute an action" in section 101(a)(4) of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411(a)(4), as meaning only to file a complaint, and not to assert a couterclaim. This reading has two consequences. First, under this reading, the section's second proviso does not bar counterclaims financed by interested employers. Second, this reading means that section 101(a)(4) gives a union member no protection against being disciplined by a union for asserting a counterclaim. Because I do not think that the majority's reading is compelled by the plain language of the phrase "to institute an action," and because I find the consequences of the majority's reading clearly at odds with the purposes of both the right protected by section 101(a)(4) and the second proviso, I respectfully dissent. I believe that the second proviso of section 101(a)(4) bars a union member's counterclaim that is funded by an interested employer and I would vacate and remand to the District Court for a finding as to whether Anthony Pelella's counterclaim was so financed.

Section 101(a)(4) provides that "[n]o labor organization shall limit the right of any member thereof to institute an action in any court." Section 101(a)(4) contains two provisos, the second of which states that "no interested employer or employer association shall directly or indirectly

finance, encourage, or participate in, except as a party, any such action."

The majority reasons that the phrase "any such action" in the second proviso refers back to the right of a member "to institute an action in any court." The majority says that although the word "action" is arguably broad enough to encompass a counterclaim, the phrase "to institute an action" means simply to file a complaint and does not include filing a counterclaim. The majority concludes that the second proviso does not prevent a member from pursuing a counterclaim funded by an interested employer because the assertion of a counterclaim does not "institute an action."

I agree with the majority that the phrase "any such action" in the second proviso refers back to the phrase "to institute an action." Under the second proviso, an interested employer may not finance an action instituted by a union member. However, in my view, the right "to institute an action" includes the right to assert a counterclaim. If "to institute an action" includes asserting a counterclaim, then the phrase "any such action" in the second proviso refers not only to initial claims by plaintiffs but also to counterclaims. Thus, I would hold that the second proviso bars counterclaims financed by interested employers. I reach this conclusion both because I think it is consistent with the plain language of the statute, and because my reading furthers the purpose of the right protected by section 101(a)(4) and also the purposes of the second proviso.

It bears emphasizing that the construction of the phrase "to institute an action" affects the scope of both the right protected by section 101(a)(4) and the scope of the second proviso. A narrow construction of the phrase gives a nar-

row scope not only to the proviso, but also to a union member's rights under the section.

The purpose of section 101(a)(4) is to protect a union member's ability to assert his rights in court without fear of reprimand by the union. The majority says that "to institute an action" means to file a complaint—not to file a counterclaim. Thus, under the majority's reading, the first part of section 101(a)(4) says in effect: "No labor organization shall limit the right of any member thereof to file a complaint." Under this reading, section 101(a)(4) does not prevent a union from limiting the right of a member to file a counterclaim. A union could sue a member and then discipline the member for asserting a counterclaim. I view this consequence as contrary to the purpose of the right-to-sue provision. My reading of "to institute an action" protects the ability of a member to assert a counterclaim without fear of discipline. Notably, at oral argument, Pelella's counsel agreed that a union could not limit the right of a member to assert a counterclaim, a statement I find at odds with the position that counterclaims financed by interested employers are not barred by the second proviso.

In addition, my view that the second proviso bars counterclaims financed by interested employers furthers the two purposes of the proviso: To protect unions from harassing or divisive claims caused by interested employers and to protect members from being misled or coerced by employers into filing claims against their interests.

The majority claims that its reading is consistent with the purposes of section 101(a)(4) and its second proviso. But in fact, as I explain below, the majority's reading leaves union members vulnerable to discipline by unions and coercion by interested employers, and does not protect

unions from harassing or divisive counterclaims supported by interested employers.

I respond first to the majority's "plain meaning" argument. The majority asserts that under the plain language of the statute, "to institute an action" means only to file a complaint and does not include filing a counterclaim. The majority admits that the word "action" is arguably broad enough to encompass any type of judicial proceeding, including counterclaims. Indeed, the authority for that proposition is extensive.[1] However, the majority says that

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[1] Support comes not only from *Koolik v. Markowitz*, 40 F.3d 567 (2d Cir. 1994) (per curiam), which the majority discusses, but from other cases as well. Courts have read an attorneys' fees provision of the Employee Retirement Income Security Act that states that fees are to be awarded in "any action" by a fiduciary for or on behalf of a plan in which a judgment in favor of the plan is awarded to mandate payment of fees to a pension fund that prevails on a counterclaim. *See* 29 U.S.C. § 1132(g)(2) ("In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan— . . . . (D) reasonable attorney's fees and costs of the action, to be paid by the defendant . . . ."); *Malden Mills Indus., Inc. v. ILGWU Nat'l Ret. Fund*, 766 F. Supp. 1202, 1218 (D. Mass. 1991) ("Although the literal wording of section 1132(g)(2) refers to an 'action' by a fiduciary, various courts have interpreted this to include a counterclaim by a pension fund for withdrawal liability or delinquent contributions under section 1145."); *see also Penn Elastic Co.* v. *United Retail and Wholesale Employees Union, Local 115 Joint Pension Fund*, 792 F.2d 45, 48 (3d Cir. 1986).

In addition, counterclaims are often treated like claims asserted by the plaintiff in the original action. Counterclaims for affirmative relief are generally subject to applicable statutes of limitation. *See, e.g., Hurst v. U.S. Dep't of Educ.*, 901 F.2d 836, 837 (10th Cir. 1990) ("It is fairly well established . . . that a counterclaim for affirmative relief . . . is subject to the operation of pertinent statutes of limitation."). A court may enter a separate, final judgment on any counterclaim after making an express determination that there is no just reason for delay. *See* Fed.

although the word "action" standing alone might include a counterclaim, the phrase as a whole—"to institute an action"—means simply to file a complaint. The majority points out that "institute" means to "begin," "commence," or "initiate by performing the first act or step." According to the majority, an action is instituted when the plaintiff files a complaint, as "that constitutes the first step invoking the judicial process." *Ante* at 388. In the majority's view, a defendant does not "institute" an action when he asserts a counterclaim.

In my view, if an "action" can encompass a counterclaim, then "to institute an action" can mean to assert a counterclaim. A defendant commences or initiates a claim for relief against the plaintiff by asserting a counterclaim in the answer. Filing a counterclaim is the first step in the defendant's action against the plaintiff. I read section 101(a)(4) as protecting the right of a union member to assert a claim on which relief is sought—whether it be in an initial complaint or as a counterclaim. It is worth noting that a literal reading of section 101(a)(4) would mean that a union could not limit the right of a member to "institute" or file a claim for relief, but could discipline the member for further pursuing a claim after filing it. Surely the right-

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R. Civ. P. 54(b); *Reiter v. Cooper*, 507 U.S. 258, 265 (1993) ("A defense cannot possibly be adjudicated separately from the plaintiff's claim to which it applies; a counterclaim can be. Federal Rule of Civil Procedure 54(b) permits a district court to enter separate final judgment on any claim or counterclaim, after making 'an express determination that there is no just reason for delay.'" (citation omitted)). Finally, a court may sever counterclaims for separate trial in furtherance of judicial convenience, to avoid prejudice, or when separate trials will be conducive to expedition and economy. *See* Fed. R. Civ. P. 13(i) & 42(b); *Sound Video Unlimited., Inc. v. Video Shack Inc.*, 700 F. Supp. 127, 146 (S.D.N.Y. 1988).

to-sue provision protects not only the initial filing of a claim but also the maintenance of a claim. Otherwise, the right protected by section 101(a)(4) would be rendered meaningless.

As the majority has noted, in *Koolik v. Markowitz*, 40 F.3d 567 (2d Cir. 1994) (per curiam), we read a provision that operated to stay the "commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor" upon the filing of a bankruptcy petition to stay a counterclaim asserted against the debtor. *See* 11 U.S.C. § 362(a)(1). According to the majority, in *Koolik*, a broad construction of the language furthered the purpose of the statute at issue. The majority argues that a broad construction of the language is inappropriate in the present case because it does not further the purpose of the LMRDA.

I disagree. In my view, construing the phrase "to institute an action" to include the assertion of counterclaims furthers the purpose of the basic right guaranteed to union members by section 101(a)(4), and also the purposes of the second proviso.[2]

The LMRDA was "Congress' first major attempt to regulate the internal affairs of labor unions," *Local No. 82, Furniture and Piano Moving v. Crowley*, 467 U.S. 526, 528

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[2] "Statutory construction begins with the plain text and, if that text is unambiguous, it usually ends there as well." *United States v. Gayle*, 342 F.3d 89, 92 (2d Cir. 2003). However, "[t]o resolve . . . textual ambiguity, we may consult legislative history and other tools of statutory construction to discern Congress's meaning." *Id.* at 93; *see also Disabled in Action of Metro. N.Y. v. Hammons*, 202 F.3d 110, 124 (2d Cir. 2000) ("We focus on the most authoritative and reliable materials of legislative history, including: the conference committee report, committee reports, sponsor/floor manager statement and floor and hearing colloquy.").

(1984), and "was the product of congressional concern with widespread abuses of power by union leadership," *Finnegan v. Leu*, 456 U.S. 431, 435 (1982). *See also* 29 U.S.C. § 401; H. Rep. No. 86-741 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2424, 2428-29.

The legislation that ultimately became Title I of the LMRDA—the "Bill of Rights" for union members—was introduced on the floor of the Senate by Senator McClellan. *See* 105 CONG. REC. 6475-76 (1959), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1102 (1959) [hereinafter LEGISLATIVE HISTORY]; *see also United Steelworkers of Am. v. Sadlowski*, 457 U.S. 102, 109 (1982). The Senate Committee on Labor and Public Welfare had reported out a bill containing provisions that were the forerunners of Titles II through VI of the LMRDA. *Sadlowski*, 457 U.S. at 109. However, "Senator McClellan and other legislators feared that the bill did not go far enough because it did not provide general protection to union members who spoke out against the union leadership. Senator McClellan therefore proposed an amendment that he described as a 'Bill of Rights' for union members." *Id.* (citing 105 CONG. REC. 6469-93 (1959), *reprinted in* 2 LEGISLATIVE HISTORY 1096-1119).

Section 101(a)(4), entitled "[p]rotection of the right to sue," was intended to ensure that union members could assert their rights in court without interference from their unions. *See* 105 CONG. REC. 17,899 (1959), *reprinted in* 2 LEGISLATIVE HISTORY 1432 ("The basic intent and purpose of the provision was to insure the right of a union member to resort to the courts, administrative agencies, and legislatures without interference or frustration of that right by a labor organization.") (statement of Sen. John F. Kennedy);

105 CONG. REC. 6478 (1959), *reprinted in* 2 LEGISLATIVE HISTORY 1105 (recounting an instance where a local union leader was expelled from his union after suing an international officer and saying that "we are certainly on the right track when we guarantee to . . . the present-day leaders of labor, who want to have honesty in their union, the right to sue and to bring into court the persons who are divesting them and their unions of their funds") (statement of Sen. Mundt).

Section 101(a)(4) is written inclusively. The union cannot limit a member's right to sue "irrespective of whether or not the labor organization or its officers are named as defendants or respondents." 29 U.S.C. § 411(a)(4). Congress rejected a version of the bill that restricted the application of the provision to suits "against such labor organizations or any officer thereof." *See Glasser v. Am. Fed'n of Musicians*, 354 F. Supp. 1, 5 (S.D.N.Y. 1973) (citing H.R. 8342, 86th Cong. (1959), *reprinted in* 1 LEGISLATIVE HISTORY 698). Courts have interpreted the right-to-sue provision broadly in other contexts. *See, e.g., Moore v. Local 569 of the Int'l Bhd. of Elec. Workers*, 53 F.3d 1054, 1056-57 (9th Cir. 1995) (holding that a fee-shifting provision in a collective bargaining agreement requiring employees to pay the attorneys' fees of the prevailing party in legal proceedings undertaken to challenge an arbitrator's decision violated section 101(a)(4), noting that the statute "is worded in the most inclusive terms, which are clearly intended to preclude restraints upon members' rights to seek relief from courts and agencies" and "we must be vigilant in assuring that union members' rights are not ground down"), *cert. denied*, 516 U.S. 1111 (1996) and 517 U.S. 1234 (1996); *Pawlak v. Greenawalt*, 628 F.2d 826, 831 (3d Cir. 1980)

(holding that section 101(a)(4) prevents a union from fining a member for suing the union without first exhausting union procedures regardless of whether the member's claim concerns matters "internal" or "external" to the union), *cert. denied*, 449 U.S. 1083 (1981); *Phillips v. Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers, Local 118*, 556 F.2d 939, 942 (9th Cir. 1977) (holding that a union violates section 101(a)(4) when it sues members to punish them for their prior suit against the union, noting that "[i]f a union member's right to sue is to have any meaning, courts must be ever vigilant in protecting that right against indirect and subtle devices as well as against direct and obvious limitations"); *Operating Eng'r Local Union No. 3 v. Burroughs*, 417 F.2d 370, 373 (9th Cir. 1969) ("Section 411(a)(4) speaks of—'an action in any court.' The word 'action' is in no way limited and there is nothing in the Act which distinguishes between suits involving member as opposed to employee rights, between suits involving internal as opposed to external union problems, or between suits brought in good faith as opposed to those brought in bad faith. . . . [W]e do not condone the use of lawsuits for harassment purposes and do not suggest that a union would not have all of the rights which the law gives to those who are so harassed. What we do say is that the freedom to sue is precious; that the winner in a lawsuit should not have the right to discipline the loser; that the potential suitor should not be subjected to the threat of such discipline. . . ." (footnotes omitted)), *cert. denied*, 373 U.S. 916 (1970); *cf. Gilvin v. Fire*, 259 F.3d 749, 760 (D.C. Cir. 2001) (holding that a plaintiff's appearance in court in response to a subpoena was protected by section 101(a)(4); rejecting District Court's view that a member is protected by the provision's guarantee of the right to appear as a wit-

ness only if the member actually testifies and noting that there "is no justification for such a narrow reading of such an important element of a union member's Bill of Rights").

Thus, construing a union member's right "to institute an action" to include the right to assert a counterclaim furthers the purpose of section 101(a)(4): To guarantee a member's right to seek relief from a court without being disciplined or otherwise frustrated by his union. Under the majority's reading of the phrase "to institute an action," section 101(a)(4) does not prevent a union from limiting a member's right to assert a counterclaim. Rather, the section prevents only a union from limiting a member's right to file a complaint. Under this reading, the right-to-sue provision permits a union to discipline a member for asserting a counterclaim when sued. In fact, a union that fears a member has a valid claim against it can sue the member preemptively and then limit the member's ability to file a counterclaim against it. This reading gives a narrow scope to the rights of union members that I find at odds with the purpose of the provision.

As explained above, I read "to institute an action" to encompass the assertion of a counterclaim and thus read section 101(a)(4) as preventing a union from limiting a member's right to assert a counterclaim. Because I think the phrase "to institute an action" includes asserting a counterclaim, the second proviso necessarily bars counterclaims funded by interested employers—as the phrase "any such action" in the second proviso refers back to the phrase "to institute an action."

Holding that the second proviso bars employer-supported counterclaims furthers the purposes of the proviso. It is apparent from the legislative history that Congress had

two purposes in enacting the second proviso. The majority discusses the first purpose: Congress wanted to deny employers the power to put pressure on unions or create divisions in unions by encouraging suits by members. *See Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Nat'l Right to Work Legal Defense and Educ. Found., Inc.*, 590 F.2d 1139, 1151 (D.C. Cir. 1979) ("We think Congress wanted to deny employers the power to cause harassing suits or otherwise to create divisions in the unions with which they had relationships."); *Adamszewski v. Local Lodge 1487, Int'l Ass'n of Machinists and Aerospace Workers*, 496 F.2d 777, 783 (7th Cir.) ("In the explanation of Senator Javits, it was brought out that the word 'interested' was inserted to allow a friend or bank to finance a suit but not an employer who may gain an advantage over the union from such suit. Otherwise, an employer with such an interest could bring undue pressure on the union."), *cert. denied*, 419 U.S. 997 (1974); *Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Nat'l Right to Work Legal Defense and Educ. Found., Inc.*, 366 F. Supp. 46, 48 (D.D.C. 1974) (stating that the second proviso "serves to protect unions from harassing litigation and illegal management interference with their internal disputes with dissident workers" and gives "express assurance to labor organizations that they shall be immune from 'interested employer' intrusion in their judicial disputes with workers"); 105 CONG. REC. 6725 (1959), *reprinted in* 2 LEGISLATIVE HISTORY 1237 ("I have in mind the fact that an employer who has an interest in the litigation ought not to bring pressure upon a union. In the eventuation of a relationship of the litigant to the union, an interested

employer should not be a party to finance the suit.") (statement of Sen. Javits);[3] 105 CONG. REC. A7915 (1959), *reprinted in* 2 LEGISLATIVE HISTORY 1811 ("The last proviso in section 101(a)(4) was added to make sure that interested employers do not take advantage of rights accorded union members by encouraging or financing harassing suits or proceedings brought by union members against their unions.") (statement of Rep. Griffin).

The second purpose of the proviso was to protect a union member from being coerced or misled by an employer into taking action against the member's best interests. *See Nat'l Right to Work*, 590 F.2d at 1149 ("The debate clearly shows that the proviso was primarily 'an attempt to protect a union member who may be engaged in a dispute with the (labor) organization.' Congress apparently was concerned that if employers were permitted to encourage, finance, or participate in suits by their employees against unions, they would be able, through subtle coercion or otherwise, to lead union members into action contrary to the members' desires or best interests.") (citation omitted); 105 CONG. REC. 6725 (1959), *reprinted in* 2 LEGISLATIVE HISTORY 1237 ("The provision is an attempt to protect a union member who may be engaged in a dispute with the organization.") (statement of Sen. Kuchel).[4]

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[3] Senator Javits suggested adding the word "interested" before "employer" in the second proviso. *See* 105 CONG. REC. 6725 (1959), *reprinted in* 2 LEGISLATIVE HISTORY 1237.

[4] Senator Kuchel introduced an amendment which added a version of the second proviso to section 101(a)(4). *See* 105 CONG. REC. 6693 (1959), *reprinted in* 2 LEGISLATIVE HISTORY 1220-21. Senator Kuchel's version was identical to the proviso enacted except that it did not contain the word "interested" before "employer."

The majority focuses on the first purpose of the proviso—to deny employers the power to cause harassing suits or to otherwise create divisions in unions. According to the majority, these concerns have less force when the union has already initiated legal action against its member. *See ante* at 393. I agree that the circumstances differ to some degree when the union has itself brought a dispute to court. However, I think that an employer can disrupt or create divisions in unions by financing counterclaims by members. An employer could hinder a union's efforts to discipline members by financing the litigation of members' counterclaims against the union when the union sues to collect fines. The majority says that by taking the member to court, "the union itself introduces the outside actor into what once had been an internal grievance and opens the door to some measure of interference." *Ante* at 393. However, the "outside actor" to which the majority refers is the court. The proviso is concerned about a different outside actor—the employer. Permitting an interested employer to fund counterclaims has the potential to cause the type of harm that the proviso sought to avoid.

In addition, in enacting the second proviso, Congress was concerned about an interested employer misleading or coercing a union member into taking action against his best interests. This concern applies with respect to counterclaims. Under certain circumstances, a union member may be better off simply defending against a union's claims, but an interested employer in an attempt to further its own interests could mislead or coerce a member into asserting a counterclaim.

The majority reasons that "denying members the ability to secure resources from interested employers so that they can protect themselves under these circumstances—where

the union invokes judicial assistance to enforce disciplinary charges and the fines that result therefrom—may leave the members vulnerable to the same abuses of union power that the LMRDA seeks to remedy." *Ante* at 394. The majority points to the rule of statutory construction "that a proviso states an exception from the general policy which a law embodies, and should be strictly construed and so interpreted as not to destroy the remedial processes intended to be accomplished by the enactment." *Ante* at 394 (quoting *Shilkret v. Musicraft Records*, 131 F.2d 929, 931 (2d Cir. 1942) (internal quotation marks omitted)). According to the majority, a "narrow interpretation" of the proviso "better comports with Title I's purpose of protecting union members from abusive union practices." Ante at 394.

I do not think that the rule of statutory interpretation to which the majority refers—that provisos should be strictly construed—applies here because the scope of both the basic right protected by section 101(a)(4) and the second proviso turn on the meaning of the phrase "to institute an action." Construing the phrase narrowly gives a narrow scope to the second proviso, but also gives a narrow scope to the rights of union members under section 101(a)(4). Although the majority expresses concern that construing the second proviso to bar employer-supported counterclaims will leave union members vulnerable to abuses of union power, reading the right-to-sue provision to give no protection to a member's ability to assert a counterclaim leaves members more vulnerable to abusive union practices then they would be under my reading of section 101(a)(4) and its second proviso. My reading protects union members from discipline by unions for asserting counterclaims and from being misled or coerced by inter-

ested employers. Furthermore, under my reading, unions are protected from harassing and divisive counterclaims financed by interested employers.

The majority, responding to my dissent, argues that we are asked in this appeal to construe only the second proviso and the effect of our interpretation on the right protected by the main body of section 101(a)(4) should not be considered. *See ante* at 395. However, I am engaging in simple statutory interpretation—not hypothetical analysis. Our task is to construe the meaning of the second proviso. The meaning of the proviso depends on the meaning of the phrase "any such action," which appears in that proviso. The majority and I agree that the phrase "any such action" refers back to the phrase "to institute an action," which appears in the main body of section 101(a)(4). To determine what Congress meant when it said "to institute an action," I look at the impact of various constructions on the meaning of the main body of section 101(a)(4), which is where the phrase actually appears in the statute.

In the majority's view, the phrase "to institute an action" does not encompass the filing of a counterclaim. Based in part on my belief that Congress did not intend section 101(a)(4) to give no protection to a member's right to file a counterclaim, I conclude that Congress did not intend the phrase "to institute an action" to have the meaning the majority gives it. The words "to institute an action," which the majority holds do not encompass the filing of a counterclaim, could not somehow have a different meaning when we consider the meaning of the main body of section 101(a)(4). This is not even a case where a phrase appears twice in a statute and we would presume ordinarily that the phrase has the same meaning in both places. Rather, here we are discussing the meaning of the same words in the

same place in the statute. The majority has given those words a certain meaning and cannot suggest that the words do not retain that meaning when the scope of members' rights under the main body of section 101(a)(4) is considered.

The majority's reading of the phrase "to institute an action" leads to a meaning of the main body of section 101(a)(4)—and of the second proviso—that I do not think Congress intended. I believe that my reading of the phrase, to include the assertion of counterclaims, better comports with Congressional intent.

In sum, I think that section 101(a)(4)'s guarantee of a union member's right to sue extends to the right to assert a counterclaim, and that counterclaims which are supported by interested employers are barred by the second proviso. Thus, I would vacate and remand to the District Court for a finding as to whether Anthony Pelella's counterclaim indeed was financed by an interested employer.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

99 Civ. 9473 (GAY)
Copies mailed May 24, 2001

LOCAL UNION NO. 38, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO,

Plaintiff,

—against—

ANTHONY PELELLA,

Defendant.

MEMORANDUM DECISION AND ORDER

On September 3, 1999, plaintiff Local Union 38, Sheet Metal Workers' International Association, AFL-CIO ("Local 38") commenced this action pursuant to 29 U.S.C. § 185, for the purpose of collecting a fine imposed by Local 38 upon defendant Anthony Pelella. Defendant subsequently asserted a counterclaim for breach of contract and violation of due process. Presently before this Court is plaintiff's motion for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, wherein plaintiff argues that defendant's counterclaim is barred by 29 U.S.C. § 411(a)(4).[1] For the reasons that follow, plaintiff's motion for partial summary judgment is denied.

[1] This action is before me for all purposes on the consent of the parties, pursuant to 28 U.S.C. § 636(c).

29 U.S.C. § 411(a)(4) guarantees the right of a union member to bring an action against his union and its leaders in court or before an administrative agency, subject to two provisos:

> No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, . . . : *Provided,* That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further,* That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

29 U.S.C. § 411(a)(4) (italics in original) (emphasis added). Here, plaintiff relies on the second proviso § 411(a)(4) in support of its contention that defendant's counterclaim is barred because it is financed by an interested employer.

Although § 411(a)(4) was enacted over forty years ago, there is scant case law regarding the application and interpretation of its second proviso. Notably, the majority of these cases were decided in the context of actions commenced by union members against unions and/or union officials. *See, e.g., International Union, United Auto., Aerospace and Agric. Implement Workers of America, Inc.*

v. National Right to Work Legal Defense and Educ. Found., Inc., 781 F.2d 928 (D.C. Cir. 1986); *Harris v. Plasterers and Cement Masons Local No. 406*, 619 F.2d 1164 (7th Cir. 1980); *Adamszewski v. Local Lodge 1487, Int'l Assoc. of Machinists and Aerospace Workers, AFL-CIO*, 496 F.2d 777 (7th Cir. 1974); *Colapietro v. International Assoc. of Machinists and Aerospace Workers*, 611 F. Supp. 90 (D. R.I. 1985); *Farowitz v. Associated Musicians of Greater New York, Local 802*, 241 F. Supp. 895 (S.D.N.Y. 1965). More importantly, only one reported case squarely addresses the issue at bar—whether 29 U.S.C. § 411(a)(4) precludés interested employers from financing a union member's counterclaim against the union. *See International Brotherhood of Electrical Workers, Local 336 v. Illinois Bell Tel. Co.*, 496 F.2d 1 (7th Cir. 1974). There, the Seventh Circuit concluded that

> the language Congress chose prohibits the financing of "any such action," which refers back to the right of a member "to institute an action in any court." We can only presume that Congress meant what it said, that an interested employer may not finance the institution of a suit by employees, but is free to finance a defense or a counterclaim.

Id. at 3.

I find the reasoning of the Seventh Circuit in *International Brotherhood* to be persuasive. "[T]he starting point for interpreting a statute is the language of the statute itself." *United States v. Reynoso*, 239 F.3d 143, 146 (2d Cir. 2000) (quoting *United States v. Piervinanzi*, 23 F.3d 670, 677 (2d Cir. 1994)). It is well-settled that "[w]hen the language of the statute is clear and does not contradict a

clearly expressed legislative intent, our inquiry is complete and the language controls." *United States v. Koh*, 190 F.3d 632, 636 (2d Cir. 1999) (quoting *United States v. Kinzler*, 55 F.3d 70, 72 (2d Cir. 1995). In other words, there is a "strong presumption that the plain language of the statute expresses congressional intent," which can only be rebutted "when a contrary legislative intent is clearly expressed." *Koh*, 190 F.3d at 637 (quoting *Ardestani v. INS*, 502 U.S. 129, 135-36 (1991)). Here, the plain language of § 411(a)(4) does not prohibit interested employers from financing a union member's defense. Additionally, based upon a review of the legislative history, I conclude that congressional intent would not be defeated by giving literal meaning to the statute. *See International Brotherhood*, 496 F.2d at 3 n.4 ("We find nothing in the legislative history concerning the defense of suits against union members.") I conclude, therefore, that 29 U.S.C. § 411(a)(4) does not bar defendant's counterclaim. Accordingly, plaintiff's motion for partial summary judgment must be DENIED.

Counsel are directed that a telephone conference will be held on June 22, 2001, at 9:00 a.m., at which time the Court will schedule a trial date. Plaintiff shall initiate the call.

SO ORDERED:

/s/ GEORGE A. YANTHIS
GEORGE A. YANTHIS, U.S.M.J.

Dated: May 24, 2001
White Plains, New York

Copies of the foregoing have been mailed to:

Jeffrey S. Dubin, Esq.
Stephen Bergstein, Esq.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

99 Civ. 9473 (GAY)
Filed June 28, 2002

LOCAL UNION NO. 38, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO,

Plaintiff,

—against—

ANTHONY PELELLA,

Defendant.

MEMORANDUM DECISION AND ORDER

I. *Procedural History*

Plaintiff, Local Union No. 38, Sheet Metal Workers' International Association ("Local 38"), commenced this action seeking to collect a fine imposed on defendant Anthony Pelella. The find of $4,418 was imposed on Local 38 member Pelella after a trial before the Executive Board of Local 38. Pelella answered and asserted a counterclaim against Local 38 under Title 29 U.S.C. § 411 alleging violations of his due process rights and breach of contract.

A jury trial was held on November 26-27, 2001. On November 27, 2201 the jury returned a verdict in favor of Pelella on his counterclaims. The jury awarded Pelella

nominal damages of $1.00 and punitive damages of $25,000.00. The jury did not award any compensatory damages. Pelella has now moved in post-verdict motions for a new trial on compensatory damages and for attorneys' fees pursuant to Fed. R. Civ. P. 59. Local 38 has brought post-verdict motions for judgment as matter of law seeking to have the $25,000.00 in punitive damages set aside pursuant to Fed. R. Civ. P. 50 or a new trial pursuant to Fed. R. Civ. P. 59.

II. *Standard of Review*

It is within a trial court's sound discretion to grant or deny a Rule 59 motion for a new trial. *US East Telecomm., Inc. v. US West Comm. Servs. Inc.*, 38 F.3d 1289, 1301 (2d Cir. 1994). A grant of a new trial on the ground that the verdict was against the weight of the evidence is appropriate if "the jury has reached a seriously erroneous result or . . . the verdict is a miscarriage of justice." *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 133 (2d Cir. 1998) (internal quotation marks omitted).

The trial judge hearing a motion for a new trial is free to weigh the evidence himself and need not view it in the light most favorable to the verdict winner. *S. Song v. Ives Laboratory, Inc.*, 957 F.2d 1041, 1047 (2d Cir. 1991). It is well settled that "the jury is empowered and capable of evaluating a witness's credibility, and this evaluation should rarely be disturbed." *Whitton v. Williams*, 90 F.Supp. 2d 420, 431 (S.D.N.Y. 2000) *citing Dunlap McCuller v Riese*, 980 F.2d 153, 168 (2d Cir. 1992).

Judgment as a matter of law may not be granted under Rule 50 unless the evidence, viewed in the light most favorable to the opposing party, is insufficient to permit a reasonable juror to find in their favor. *Galdieri-Ambrosini*

v. Nat'l Realty & Dev. Corp., 136 F.3d 276, 289 (2d Cir. 1998). In ruling on a motion for judgment as a matter of law, the Court may not itself weigh credibility or otherwise consider the weight of the evidence; rather it must defer to the credibility assessments that may have been made by the jury and the reasonable factual inferences that may have been drawn by the jury. *Id.* Thus, a judgment as a matter of law should not be granted unless (1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded persons could not arrive at a verdict against it. *Cruz v. Local Union No. 3 of The International Brotherhood of Electrical Workers*, 34 F.3d 1148, 1154 (2d Cir. 1994) (internal quotation marks omitted).

III. *Discussion*

A. *Pelella's Motion For A New Trial On Damages*

Pelella contends that the jury's failure to award compensatory damages to Pelella was against the weight of the evidence. He asserts that the jury was wrongfully influenced by the statement of counsel for Local 38 during closing argument about the current state of sheet metal work.[1] Pelella contends that the trial evidence was unrefuted that he suffered emotional injury. He further contends that the jury should have awarded economic

[1] In response to an objection by Pelella to said statement, the Court instructed the jury that statements by attorneys during closing arguments are not evidence. The Court's charge to the jury repeated said instruction and further advised the jury that if their recollection of the facts differs from the lawyers' statements, it is the jury's recollection which controls.

damages for loss of income based on the trial evidence. Local 38 asserts that its closing argument was proper and that, in any event, the Court instructed the jury that statements by counsel are not evidence. Local 38 also asserts that the verdict was susceptible to a reasonable interpretation.

On the issue of damages, the jury heard and was in a position to evaluate Pelella's trial testimony and demeanor. There is no dispute that the jury was properly instructed on the law concerning damages. The jury was entitled to accept or reject in whole or in part the testimony of Pelella that he suffered the alleged non-economic injuries that he testified to as a proximate cause of Local 38's wrongful conduct. Credibility determinations are the province of the jury.

As concerns the alleged economic injuries, the complained of statement by counsel for Local 38 during closing argument was not so egregious as to deprive Pelella of a fair trial particularly given the appropriate instructions given to the jury by the Court. Moreover, the jury was entitled to reasonably conclude that the economic injuries alleged by Pelella were speculative and/or not proximately caused by the unlawful conduct of Local 38. The jury had before it trial testimony that Pelella refused a position within the territory of Local 38 and was subsequently terminated for the same. In awarding nominal damages, the jury clearly determined that no actual damages were proven by Pelella.

On this record, the Court concludes that the jury verdict of no compensatory damages was neither a seriously erroneous result or a miscarriage of justice. Accordingly, the motion for a new trial is denied.

B. *Local 38's Motion to Set Aside the Punitive Damages Award*

Local 38 contends that punitive damages are not available under the Labor Management Reporting and Disclosure Act ("LMRDA") where the jury has not awarded actual damages. In *Farowitz v. Musicians Local 802*, 241 F.Supp. 895 (S.D.N.Y. 1965), the district court held that punitive damages may be awarded in an action pursuant to 29 U.S.C. § 412 even where no actual damages have been awarded. Although the issue of punitive damages being awarded in actions under the LMRDA in the absence of actual damages does not appear to have been addressed by the Second Circuit, it is well settled that punitive damages are available under the LMRDA. *Maddalone v. Local 17, United Broth. Of Carpenters and Joiners of America*, 152 F.3d 178, 186 (2d Cir. 1998) (punitive damages are available to deter malicious violations of the LMRDA); *Morrisey v. National Maritime Union*, 544 F.2d 19, 25 (2d Cir. 1976).

Here, the jury was instructed that they may make an award of punitive damages even if they found that Pelella failed to establish actual damages. Said instruction was a correct statement of the law. Recently, the Second Circuit determined that punitive damages are available even in the absence of actual damages under Title VII of the Civil Rights Act of 1964. *Cush-Crawford v. Adchem Corp.*, 271 F.3d 352, 357-60 (2d Cir. 2001) (citing cases). In *Cush-Crawford*, the Second Circuit noted that it has also held under Section 1983 that punitive damages are available regardless of whether other damages have been awarded. *See King v. Marci*, 993 F.2d 294, 298 (2d Cir. 1993). This Court concludes that no compelling reason has been

advanced by Local 38 to preclude punitive damages in the absence of actual damages under the LMRDA.

The objectives and rationale of punitive damages differs from actual damages. *Crush-Crawford* at 359. This Court agrees that parties who engage in malicious or reckless violations should not escape the punitive or deterrent goals of punitive damages "merely because either good fortune or a plaintiff's unusual strength or resilience protected the plaintiff from suffering harm." *Id.* The amount of any award of punitive damages is subject to review on post-verdict motion and on appeal. Any such award must be reasonable in its amount and rational in light of the purpose to punish what has occurred to deter its repetition. *Lee v. Edwards*, 101 F.2d 118, 121 (2d Cir. 1992). It is also well settled that a jury may also consider the financial resources of a defendant in fixing the amount of punitive damages if a defendant offers evidence of the same. *See Provost v. City of Newburgh*, 262 F.3d 146, 162-64 (2d Cir. 2001). Accordingly, the motion for judgment as a matter of law setting aside the award of punitive damages is denied.

Moreover, the Court concludes that there was ample evidence in the record for the jury to determine that punitive damages were justified. Punitive damages are appropriate where defendants acted "wantonly or willfully or were motivated by ill-will, malice or desire to injure the plaintiffs." *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 909 (2d Cir. 1993). Here, the jury was entitled to conclude based upon the trial evidence that the charges served on him by Local 38 were woefully inadequate and did not provide him with the specificity required by the statute. Pelella testified that he was not advised of his procedural rights to be represented by counsel and present evidence. The jury was also entitled to conclude that the hearing pro-

vided to Pelella was a mockery given the fact that two members of the trial committee were related to the charging party. Moreover, there was trial evidence that the Local 38 trial committee presented the membership with a misleading account of Pelella's trial rebuttal prior to the membership voting to affirm the decision.

The Court concludes that there was sufficient evidence at trial from which a reasonable jury could conclude that punitive damages were warranted. Simply stated, the jury had sufficient evidence before it to conclude that Local 38 acted with a callous disregard or indifference to the rights of Pelella. In addition, the Court concludes that the $25,000,00 awarded by the jury was reasonable in amount given the purposes of punishing flagrant conduct and deterring similar conduct in the future. Accordingly, Local 38's motion for judgment as a matter of law setting aside the award of punitive damages is denied. The motion for a new trial is also denied as the verdict was neither a seriously erroneous result or a miscarriage of justice.

C. *Pelella's Motion for Attorneys' Fees and Costs*

As a prevailing party, Pelella has moved for attorneys' fees and costs. Local 38 has opposed the motion asserting that Pelella has not conferred a substantial benefit on the union members. In *Hall v. Cole*, 412 U.S. 1, 5 (1973), the Supreme Court held that attorneys' fees could be granted in claims pursuant to the LMRDA under the "common benefit" theory. Said theory permits an award of attorneys' fees where "the plaintiff's successful litigation confers 'a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will oper-

ate to spread the costs proportionately among them." *Id.* at 5 (citation omitted).

In *Rodonich v. Senshyn*, 51 F.3d 28, 33 (2d Cir. 1995) (citation omitted), the Second Circuit stated that courts should "appraise the need for and potential benefits derived from the attorney's services, based on the judge's personal observation of counsel's performance and his intimate familiarity with the case." Moreover, a union member prevailing under the LMRDA "need not recover compensatory damages from the union in order to be entitled to a fee award." *Cruz v. Local Union No. 3 of the Int'l Bhd. Of Elec. Workers*, 34 F.3d 1148, 1159 (2d Cir. 1994) (*quoting Rosario v. Amalgamated Ladies' Garment Cutters' Union*, 749 F.2d 1000, 1004 (2d Cir. 1994). In *Cruz*, the court stated: "The *Rosario* court explained that awarding attorneys fees in such cases is valid because the liability verdict recognized the 'deprivation of the plaintiffs' due process rights' by the union, and thus was 'of benefit to the union and its membership regardless of the amount of provable damage to the plaintiffs." *Id.* at 1159.

In this case, the Court concludes that the liability verdict against Local 38 recognized the deprivation of Pelella's due process rights by the union and that a "common benefit" inured to all union members. This is particularly the case given the fact that there is testimony in the record from the Local 38 president to the effect that the inadequate charges here looked the same as other charges brought by the union. Another "common benefit" to Local 38 and its members would be that members served with charges would receive notice of their procedural rights at trial. It is also likely that the union will now select impartial members for its trial committees which will inure to the benefit of all union members facing charges.

Simply stated, this Court finds that "common benefits" have been conferred on the members of Local 38 as a result of this civil action. As such, the motion for attorneys' fees and costs is granted. The Court has reviewed the claimed hourly rates of attorney Sussman of $300 per hour, attorney Watkins of $200 per hour, and attorney Bergman of $200 per hour. The Court finds said hourly rates to be reasonable for each counsel of their respective experience levels.[2] Also, the number of hours expended appears reasonable and adequately identified with the following exceptions. Counsel has not separated out travel time which this Court concludes should be awarded at one-half the hourly rates. *See Knoeffler*, 126 F.Supp. 2d at 314. In addition, a number of entries are impermissibly vague. As such, the Court concludes that a 10 per cent reduction of the requested lodestar would be fair and reasonable.

Accordingly, the lodestar amount is as follows: Attorney Sussman – 26.5 at $300/hour for a total of $7,950.00. Attorney Bergstein – 22.85 hours at $200/hour for a total of $4,570.00. Attorney Watkins – 79.25 at $200/hour for a total of $15,850.00; and supplemental fees of 26 hours of $200/hour for a total of $5,200.00. Total fees for attorneys Sussman, Bergstein, and Watkins, prior to the reduction, would be $33,570.00. A reduction of said amount by 10 per cent would result in a total attorneys fees of $30,213.00 which are hereby awarded. Costs of $205.50 for depositions are reasonable and are hereby awarded.

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[2] Although attorney Bergstein has left the Sussman firm and did not provide background information to support this motion, this Court and others in the district have awarded him at or near this hourly rate in the past. *See Knoeffler v. Town of Manakating*, 126 F.Supp. 2d 305, 312-13 (S.D.N.Y. 2000) (setting forth experience level of attorney Bergstein and awarding hourly rate of $200.00).

The Court has reduced the requested costs by the amount of the interest fees for late payment.

CONCLUSION

The motion by Pelella for a new trial on damages is denied. The motion by Local 38 for judgment as a matter of law setting aside the award of punitive damages or a new trial is denied. The motion by Pelella for attorneys' fees and costs is granted. Total attorneys' fees of $30,213.00 and costs of $205.50 are awarded to Pelella. The Clerk of the Court shall enter judgment accordingly.

SO ORDERED:

/s/ GEORGE A. YANTHIS
GEORGE A. YANTHIS
U.S. MAGISTRATE JUDGE

Dated: June 27, 2002
White Plains, New York

(2)

No. 03-1472

Supreme Court, U.S.
FILED
MAY 6 - 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

LOCAL UNION NO. 38, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO,

Petitioner,

against

ANTHONY PELELLA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

A. Factual background

This case grows out of petitioner Local 38's efforts to force respondent Anthony Pelella to pay a fine imposed by the Union following a Union hearing on whether Pelella performed contracting work in violation of Union rules. The trial in Federal court established that the Union had egregiously violated Pelella's statutory due process rights, and the jury awarded him $25,000 in punitive damages and nominal compensatory damages on his counterclaim.

Pelella was an apprentice member of Local 38, Sheet Metal Workers' International Association, AFL-CIO. In October 1998, Local 38's business representative, Nicholas Colombo, Sr., charged Pelella with improperly working for a Local 38 contractor. The written charges did not allege when or where Pelella had committed this infraction, the number of hours in question, or even that the work was covered by the union contract. (SA 34, 109).[1]

Procedural irregularities infected the in-house Union "trial." Pelella was not notified in advance that he could remove two members of the trial committee. (SA 108-09). Nor was he "advised of his procedural rights to be represented by counsel and present evidence." (Pet. App. 57) (hereinafter "___a"). The charging party's brother was trial committee chairman and the charging party's son was also on the trial committee. (58a, SA 112). As Magistrate Judge George A. Yanthis held post-trial, the jury was "entitled to

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[1] SA-___ refers to the Supplemental Appendix in the Court of Appeals. JA-___ refers to the Joint Appendix.

conclude that *the hearing provided to Pelella was a mockery* given the fact that two members of the trial committee were related to the charging party." (58a) (emphasis supplied).

Local 38's Trial Committee found Pelella "guilty" for having wrongfully worked 208 hours. This figure was wholly lacking from the written charges or the trial itself, and first appeared in the Trial Committee's post-trial "findings." *Compare*, SA 112 (findings) *with* SA 108-09 (charges). Moreover, "there was trial evidence that the Local 38 trial committee presented the membership with a misleading account of Pelella's trial rebuttal prior to the membership voting to affirm the decision." (58a). Local 38's Trial Committee fined Pelella $4,418 and removed him from his employer, a decision upheld by the union membership after the Trial Committee falsely reported that Pelella had admitted guilt. (4a; SA 112-116).

B. Proceedings in the district court

Local 38 initiated this lawsuit to collect the fine against Pelella, who counterclaimed under the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 411, for violation of his statutory due process rights in connection with the disciplinary proceedings. (5a).

Claiming that an "interested employer" financed the counterclaim, the Union moved for summary judgment, arguing that the LMRDA precludes employer-financed

counterclaims. (5a-6a). Pelella disputed that an interested employer financed the counterclaim. (SA 81-82).[2]

After the district court denied summary judgment on the ground that the LMRDA does not prohibit employer-financed counterclaims, the case went to trial. The jury rejected Local 38's claim against Pelella, and returned a verdict in Pelella's favor on his due process counterclaim, awarding him $1.00 in nominal damages and $25,000 in punitive damages. (7a).

Resolving petitioner's post-trial motions, Judge Yanthis held that the jury could "make an award of punitive damages even if they found that Pelella failed to establish actual damages." (56a). *See also*, 57a ("[t]he objectives and rationale of punitive damages differs from actual damages" and "parties who engage in malicious or reckless violations should not escape the punitive or deterrent goals of punitive damages merely because either good fortune or a plaintiff's unusual strength or resilience protected the plaintiff from suffering harm"). The district court further held that "there was ample evidence in the record for the jury to determine that punitive damages were justified."

> Here, the jury was entitled to conclude based upon the trial evidence that the charges served on him by Local 38 were woefully inadequate and did not provide him with the specificity required by the statute. Pelella testified that he was not

[2] As Judge Straub noted in dissent, if this Court rejects the Second Circuit's interpretation of § 101(a)(4), this case should be remanded to the district court for a trial on whether an "interested employer" actually financed the counterclaim. (32a).

advised of his procedural rights to be represented by counsel and present evidence. The jury was also entitled to conclude that the hearing provided to Pelella was a mockery given the fact that two members of the trial committee were related to the charging party. Moreover, there was trial evidence that the Local 38 trial committee presented the membership with a misleading account of Pelella's trial rebuttal prior to the membership voting to affirm the decision.

The Court concludes that there was sufficient evidence at trial from which a reasonable jury could conclude that punitive damages were warranted. Simply stated, the jury had sufficient evidence before it to conclude that Local 38 acted with a callous disregard or indifference to the rights of Pelella. In addition, the Court concludes that the $25,000 awarded by the jury was reasonable in amount given the purposes of punishing flagrant conduct and deterring similar conduct in the future. (57a-58a).

C. The Second Circuit appeal

In a decision reported at 350 F.3d 73 (2d Cir. 2003), the Second Circuit affirmed the district court, holding that the LMRDA does not preclude interested employers from financing counterclaims. Adopting the analysis from the only other court decision addressing this issue, the Second Circuit noted the statute expressly precludes interested employers only from financing "any such actions," which refers to the right of a union member "to institute an action in any court." (10a-11a) (citing *International Brotherhood of Electrical Workers, Local 336 v. Illinois Bell Telephone Company*, 496 F.2d 1 (7th Cir. 1974)). Common

usage defines "action" as the filing of a complaint, not a counterclaim. (11a-13a).

The Court of Appeals further noted that Congress wanted "to protect unions from harassing litigation and illegal management interference with their internal disputes with dissident workers." (17a). Those concerns have less force when the union sues a member and introduces an outside actor into the internal grievance, opening the door "to some measure of interference." (17a). If anything, the Court reasoned, denying union members the assistance from interested employers so they may protect themselves would represent a further abuse of power that the LMRDA was intended to prevent. (17a-18a).

REASONS FOR DENYING CERTIORARI

This Court will only grant certiorari for compelling reasons, including a conflict with a decision of another Circuit or to review an opinion that "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure from a lower court, as to call for an exercise of the Court's supervisory power." Sup.Ct.R. 10.

Petitioner seeks review on three issues: (1) whether the LMRDA permits employer-financed counterclaims; (2) whether punitive damages are permissible without economic harm and (3) whether the LMRDA permits punitive damages. This Court should deny certiorari.

POINT I

AS THERE IS NO CIRCUIT SPLIT ON THE SECOND CIRCUIT'S INTERPRETATION OF SECTION 101(a)(4) OF THE LMRDA, CERTIORARI IS UNWARRANTED

Petitioner concedes there is no Circuit split on the question of whether § 101(a)(4) of the LMRDA prohibits employer-financed counterclaims. (Pet. at 3). As the district court observed, "there is scant case law regarding the application and interpretation of [the] second proviso" of § 411(a)(4). (49a). The only courts to have even addressed this issue – the Seventh Circuit and the Second Circuit – have resolved the issue similarly, holding that interested employers *may* finance counterclaims under the LMRDA. As the Second Circuit adopted the reasoning in *International Brotherhood of Electrical Workers, Local 336 v. Illinois Bell Telephone Company*, 496 F.2d 1 (7th Cir. 1974), petitioner cannot even identify a difference in the way Federal courts have analyzed this issue. As there is no split among the Circuits and this narrow issue arises sparingly, Supreme Court intervention to address this obscure issue is unnecessary.

POINT II

THE SECOND CIRCUIT PROPERLY INTERPRETED FEDERAL LAW IN HOLDING THAT SECTION 101(a)(4) DOES NOT PROHIBIT EMPLOYER-FINANCED COUNTERCLAIMS

Certiorari is unwarranted because the Second Circuit properly interpreted § 101(a)(4) of the LMRDA. There is no reason for Supreme Court involvement when the Court of Appeals has employed non-controversial methods of

statutory construction and legislative history in holding that interested employers may finance counterclaims under the statute.

"The language of the statutes that Congress enacts provides 'the most reliable evidence of its intent.' For that reason, we typically begin the task of statutory construction by focusing on the words that the drafters have chosen. In interpreting the statute at issue, 'we consider not only the bare meaning' of the critical word or phrase 'but also its placement and purpose in the statutory scheme.'" *Holloway v. United States*, 526 U.S. 1, 6 (1999) (quoting *Bailey v. United States*, 516 U.S. 137, 145 (1995)).

Under 29 U.S.C. § 411(a)(4), union members may

> institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, . . . Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof.

The statute further provides that "no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance or petition." *Id.*

The Court of Appeals interpreted the above provision to distinguish between employer-financed *suits* initiated by union members and employer-financed *counterclaims*.

The Circuit deemed persuasive the Seventh Circuit's analysis that "the language Congress chose prohibits the financing of 'any such action,' which refers back to the right of a member to 'institute an action in any court.'" (11a) (citing *Local 336*, 496 F.2d at 3). The Second Circuit properly held that "in the statutory context of section 101(a)(4), the word 'action' is qualified by the phrase 'to institute.'" (11a-12a) (citing *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991)). Simply put, "[a] party institutes an action when he commences a judicial proceeding." (12a) (citing *inter alia*, *McNeil v. United States*, 508 U.S. 106, 112 (1993) ("[T]he normal interpretation of the word 'institute' is synonymous with the words 'begin' and 'commence'")). Moreover, while "[a]n action is . . . instituted when a plaintiff files a complaint . . . in sharp contrast, a defendant asserts a counterclaim in response to a plaintiff's institution of an action. A counterclaim, by definition, is a 'claim for relief asserted against an *opposing party after* an *original* claim has been made.'" (12a) (citing, *inter alia*, Fed.R.Civ. P. 3 and *Moore's Federal Practice* § 13.90 (2)(a), at 13-70 (7th ed. 1997) (emphasis in original). Accordingly, the Second Circuit concluded, since "a defendant does not 'institute' an action when he asserts a counterclaim . . . [s]ince section 101(a)(4)'s second proviso limits a union member's right to 'institute an action,' the plain language of the statutory text, when read literally, does not circumscribe a member's right to pursue a counterclaim because the assertion of a counterclaim does not 'institute an action.'" (13a) (citing *Local 336*, 496 F.2d at 4).

Other provisions in § 411(a)(4) further suggest Congress did not intend to restrict employer-financed counterclaims. The statutory language references the sort of activity that a *plaintiff* would undertake, *i.e.*, naming the

labor organization "as defendants or respondents," "exhaust[ing] reasonable hearing procedures" and "instituting legal or administrative proceedings against such organizations or any officer thereof." 29 U.S.C. § 411(a)(4). The proviso addressing employer-financed claims also references plaintiff activity, *i.e.*, "any such action, proceeding, appearance or petition." *Id.* As these are not activities associated with defendants, the statute only contemplates that employers cannot finance lawsuits, not counterclaims.

Legislative history supports this statutory interpretation. The Court of Appeals reasoned that "[c]onstruing section 101(a)(4) broadly to preclude a union member from asserting a counterclaim financed by an interested employer where the union instituted an action against the member would not further the purpose of the LMRDA." (15a).

Congress intended the "right to sue" provision under § 101(a)(4) to curb abuses of power and corruption by union officials. (15a). *See generally*, *Hall v. Cole*, 412 U.S. 1, 7-8 & n.12 (1973). Congress also sought "to give union members the tools to insure the effective and fair operation of their union as a representative institution." (15a-16a) (quoting *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. National Right to Work Legal Defense and Education Foundation*, 590 F.2d 1139, 1149 (D.C. Cir. 1978)). Congress did not want "interested employers" to interfere with the disputes between unions and their members or to "cause harassing suits or otherwise to create divisions in the unions with which they had relationships." (17a) (quoting *National Right to Work*, 590 F.2d at 1151).

However, the policy reasons against allowing interested employers to finance lawsuits by union members do not apply where "a union affirmatively subjects an internal union dispute to litigation in a court of law." (17a-18a). As the Second Circuit reasoned, when the union sues a member, it "introduces the outside actor into what once had been an internal grievance and opens the door to some measure of interference." *Id.* Moreover, the concerns against allowing interested employers to "cause harassing suits" or "create divisions" between unions and their members are mitigated where the union has already sued a member. *Id.* "If anything, denying members the ability to secure resources from interested employers so that they can protect themselves under these circumstances – where the union invokes judicial assistance to enforce disciplinary charges and the fines that result therefrom – may leave the members vulnerable to the same abuses of union power that the LMRDA seeks to remedy." (18a).

The Second Circuit underscored its analysis by noting the language prohibiting interested-employer counterclaims is a proviso, which must be interpreted narrowly. "A proviso states an exception from the general policy which a law embodies, and should be strictly construed and so interpreted as not to destroy the remedial processes intended to be accomplished by the enactment." (18a) (citing *Shilkret v. Musicraft Records, Inc.*, 131 F.2d 929, 931 (2d Cir. 1942)). *Shilkret* cites settled Supreme Court authority, *Spokane & Inland R.R. v. United States*, 241 U.S. 344, 350 (1916) and *Dollar Savings Bank v. United States*, 19 Wall. 227, 336 (1873). Strictly interpreting the proviso "better comports with Title I's purpose of protecting union members from abusive union practices and, at

the same time, does not undermine the intent of the second proviso." (18a).

As Congress has not amended the pertinent portion of the statute in the wake of the Seventh Circuit's holding in *Local 336*, decided 30 years ago, Local 38 cannot persuasively argue that the Second Circuit erred in adopting the reasoning in that case. While Congress amended the definitions portion of the Act in 1978, it did not repudiate *Local 336* by, for example, more broadly defining "action" in the second proviso to include counterclaims. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 580 (1978).

Without any contrary precedents supporting its position, Local 38 resorts to policy arguments and the dissenting opinion in seeking certiorari. These arguments do not warrant Supreme Court intervention.

First, Local 38 argues that legislative intent should trump the plain meaning of the LMRDA. (Pet. at 6) (the Second Circuit "adopted a narrow, literal, 'plain meaning' construction of the second proviso. The majority opinion misconstrued the sweeping intent of the second proviso"). However, "[t]he starting point in statutory interpretation is 'the language [of the statute] itself.' The 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances,' when a contrary legislative intent is clearly expressed." *Ardestani v. INS*, 502 U.S. 129, 135-136 (1991). While petitioner claims "there is no warrant for [the Second Circuit's] reasoning in the legislative

history" (Pet. at 7), the union bears the burden of showing that Congress intended a result that deviates from the plain statutory language. Local 38 has cited no legislative history concerning whether "interested employers" can finance counterclaims. While the union argues that the Second Circuit's interpretation ignores a "bedrock rule of Federal Practice" that claims and counterclaims are generally treated similarly (Pet. at 7), the plain language of the statute in issue must trump general practice rules which, understandably, do not address the practical implications of allowing interested employers to finance counterclaims in certain labor disputes.[3]

Nor does the dissenting opinion warrant certiorari. While Judge Straub suggested that the majority's interpretation would narrow the rights under § 101(a)(4) and thus fail to "protect[] union members from discipline by unions for asserting counterclaims" (45a), the majority noted that this policy argument "is not implicated in this appeal." (19a). "As Justice Frankfurter noted, 'an exact formulation of the issue before us is necessary to avoid inadvertent pronouncement in one context when the language may require separate consideration in other settings.'" (19a) (citing *Automatic Canteen Co. of America v. F.T.C.*, 346 U.S. 51, 65 (1953)). In rejecting the dissent's hypothetical concerns, the panel further observed that in the 30 years since the Seventh Circuit first resolved this

[3] Local 38 relies on the Second Circuit's interpretation of a bankruptcy statute which equates claims with counterclaims. (Pet. at 4-5) (citing *Koolik v. Markowitz*, 40 F.2d 567 (2d Cir. 1994)). However, the Court noted that *Koolik* "turned on an interpretation of 11 U.S.C. § 362(a)," which "generally must be construed broadly." (18a n.5).

issue, no union has ever tried to limit the rights of its members in a manner envisioned by Judge Straub.

> Although the LMRDA was enacted in 1959, we are aware of no cases in which a union has argued that the text set forth in the main body of section 101(a)(4) allows a union to limit the rights of its members to assert a counterclaim. This is telling with respect to how section 101(a)(4) has been understood in the nearly 30 years since the Seventh Circuit held that the phrase 'to institute an action,' as those words were referred to in the second proviso, did not encompass the assertion of a counterclaim. In the decades after the Seventh Circuit arrived at that decision, there is no record of a single court holding that unions could limit the rights of their members to assert counterclaims against them in light of the terminology employed by section 101(a)(4). In essence, despite the fears expressed by the dissent, there is no persuasive evidence to suggest that parties and courts believe unions may limit the rights of their members to assert counterclaims. (19a-20a).

Petitioner articulates no reason for this Court to grant certiorari on the proper interpretation of § 101(a)(4) of the LMRDA. There is no Circuit split on the obscure issue of whether "interested employers" may finance counterclaims, and the Second Circuit cited legislative intent and sound policy reasons in rejecting Local 38's position.

POINT III

PETITIONER HAS WAIVED ANY ARGUMENT THAT PUNITIVE DAMAGES ARE CONSTITUTIONALLY IMPERMISSIBLE WITHOUT ECONOMIC HARM, AND THIS ISSUE IS WELL-SETTLED IN ANY EVENT

"It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. . . . [T]his is 'essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.'" *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Relatedly, a petitioner cannot seek certiorari on an issue that it expressly waived in the lower court. *City of Springfield v. Kibbe*, 480 U.S. 27, 259 (1987). That is what petitioner does here.

While petitioner asserts that respondent cannot recover punitive damages without economic harm (Pet. at 8), the Second Circuit observed that petitioner waived this argument.

> [T]he district court instructed the jury that it could award punitive damages even if the jury found that Pelella failed to establish actual damages. At oral argument, Local 38 conceded that the union did not object to the instruction. In the absence of such an objection, Local 38 . . . may not seek to alter the jury award by arguing that punitive damages cannot be recovered in the absence of actual damages. (24a).

To the extent Local 38 challenges the punitive damages as "excessive," it has waived that argument, as well.

(27a-28a). The Second Circuit noted that "the union never argued [to the district court] that the punitive damages award was constitutionally excessive. Local 38 therefore failed to preserve that challenge for appellate review." (27a). *See also*, 56a-58a. The Circuit correctly rejected Local 38's argument that *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003) – decided during the course of Local 38's appeal – altered this Court's due process analysis concerning punitive damages, therefore allowing Local 38 to challenge them as "excessive" for the first time in its appellate reply brief. (27a-28a). The Second Circuit noted that, seven years before *Campbell*, this Court established due process parameters for punitive damages in *BMW of North America v. Gore*, 517 U.S. 559, 583 (1996). (27a-28a). *Campbell* merely applied *Gore's* three-factor test for assessing punitive damages. 538 U.S. at 418. Accordingly, the Second Circuit held that Local 38 waived this argument by "fail[ing] to raise such a challenge with the court below." (28a). This Court should not grant certiorari to resolve an issue that petitioner waived in the courts below.

In any event, it is well-settled that "economic harm" is not a necessary predicate for punitive damages. While the *Campbell* plaintiffs recovered $1 million in compensatory damages solely for emotional distress and suffered no economic harm, this Court held they were entitled to punitive damages even if the $145 million award was excessive. 538 U.S. at 413-14, 419, 426. This reasoning belies Local 38's assertion that "where no economic harm has been suffered, punitive damages are constitutionally impermissible." (Pet. at 10).

To the extent petitioner argues that punitive damages may not be awarded without compensatory damages, that

argument is not supported by this Court's holdings in *Gore* and *Campbell*. In assessing whether punitive damages are excessive, *Gore* examined "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award." 538 U.S. at 418. *Gore* cautioned that "low awards of compensatory damages may properly support a higher ratio than high compensatory awards. . . . [and] a higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *Gore*, 517 U.S. at 582. *Campbell* echoed this cautionary rule. 538 U.S. at 425.

In the wake of *Gore* and *Campbell*, courts have held that ratios are not a useful means to assess punitive damages where the jury awards only nominal compensatory damages. *See*, *Lee v. Edwards*, 101 F.3d 805, 811 (2d Cir. 1996) ("The Supreme Court's observations in *Gore* reinforce that view: violations of civil rights may very well be 'particularly egregious' acts that result in only 'a small amount of economic damages' or injuries whose monetary value is 'difficult to determine.' Because the compensatory award here was nominal, *any* appreciable exemplary award would produce a ratio that would appear excessive by this measure") (emphasis in original); *Williams v. Kaufman County*, 352 F.3d 994, 1016 n.76 (5th Cir. 2003) ("As the instant case concerns the ratio between punitive and nominal damages, *Campbell*'s discussion of the proper ratio between punitive and compensatory damages is inapposite to our consideration today"). There is no reason for this Court to remand to the Second Circuit to consider whether punitive damages were appropriate in the absence of any economic harm. (Pet. at 13).

Moreover, even if ratios apply in cases with nominal compensatory awards, *Gore* and *Campbell* counsel that the appropriate ratio is between the punitive damages and the *potential* harm to plaintiff. The evidence at trial established that Local 38 caused Pelella significant potential, if not actual, harm through its wrongful conduct, subjecting him to disciplinary action, stigma among the Union membership and emotional harm while egregiously violating his due process rights and making an affirmative misstatement to the Union membership that Pelella had admitted guilt. Pelella also testified that Local 38's actions contributed to his temporary separation from his wife. While the monetary value of Pelella's noneconomic harm, or potential harm, was "difficult to determine," the jury's $25,000 punitive damages award was not disproportionate to that harm.

Petitioner does not consider the consequences of its suggestion that punitive damages are inappropriate without economic damages. Various civil rights violations simply lack any corresponding economic harm to the victim. This includes censorship in violation of the First Amendment, unlawful arrests, fair housing violations and, as here, due process violations. Without punitive damages, tortfeasors are not deterred from violating the law. *Compare, Carlson v. Green*, 448 U.S. 14, 22 n.9 (1980) ("Punitive damages may be the only significant remedy available in some § 1983 actions where constitutional rights are maliciously violated but the victim cannot prove compensable injury"). As petitioner has not articulated any sound policy reasons to upset the principle that juries may award punitive damages in the absence of compensatory damages, certiorari is unwarranted.

POINT IV

PETITIONER HAS WAIVED ANY ARGUMENT THAT PUNITIVE DAMAGES ARE NOT AVAILABLE UNDER THE LMRDA, AND THERE IS NO CIRCUIT SPLIT ON THIS ISSUE

This Court "ordinarily will not decide questions not raised or litigated in the lower courts. That rule has special force where the party seeking to argue the issue has failed to object to a jury instruction, since Rule 51 of the Federal Rules of Civil Procedure provides that '[no] party may assign as error the giving . . . [of] an instruction unless he objects thereto before the jury retires to consider its verdict.'" *Kibbe*, 480 U.S. at 259.

In seeking certiorari, Local 38 argues for the first time in this litigation that punitive damages are not available under the LMRDA. In its post-trial motion, Local 38 claimed the evidence did not support punitive damages and that this relief could not be awarded without actual damages. (56a-58a). On appeal, Local 38 abandoned the former argument, pressing only the latter. (23a-28a). In its *en banc* petition to the Second Circuit, Local 38 only argued that punitive damages are impermissible without economic harm. Perhaps most importantly, at trial, Local 38 raised no objection to the jury instructions on punitive damages. By not advancing its present argument at any point in the proceedings below, Local 38 has waived this issue.

In any event, despite Local 38's attempt to manufacture a Circuit split, the Federal courts are in agreement that the LMRDA permits punitive damages. Petitioner argues that the Fourth Circuit has rejected punitive damages in LMRDA cases. (Pet. at 13-16) (citing *United*

Mine Workers v. Patton, 211 F.2d 742, 749 (4th Cir. 1954)). However, *Patton* does not interpret the LMRDA. It reviews a different (but similarly-titled) statute, the Labor Management Relations Act (LMRA), 29 U.S.C. § 187(b). *Patton* did not address the LMRDA, and Local 38's extensive quotes from that case concern the legislative history of the LMRA, not the LMRDA.

Each Circuit to address the issue holds that punitive damages are available under the LMRDA. *See, International Brotherhood of Boilermakers v. Braswell*, 388 F.2d 193, 199 (5th Cir. 1968); *Morrissey v. National Maritime Union*, 544 F.2d 19, 25 (2d Cir. 1976); *Cooke v. Orange Belt Dist. Council of Painters*, 529 F.2d 815, 820 (9th Cir. 1976); *Vandeventer v. Local Union No. 513 of the Int'l Union of Operating Eng'rs, AFL-CIO*, 579 F.2d 1373, 1380 (8th Cir. 1978); *Quinn v. Diguilian*, 739 F.2d 637, 651 (D.C. Cir. 1984); *Doty v. Sewall*, 908 F.2d 1053, 1062 (1st Cir. 1990) and *Thompson v. Office and Professional Employees Int'l Union, AFL-CIO*, 74 F.3d 1492, 1509 (6th Cir. 1996).

Title I of the LMRDA does not specify the relief available for violations of the Act. Instead, it authorizes federal courts to award "such relief . . . as may be appropriate." 29 U.S.C. § 412. Congress did not specify the available remedies to avoid the "'danger that those remedies not listed might [thereby] be proscribed with the result that the courts would be fettered in their efforts to grant relief according to the necessities of the case.'" *Hall*, 412 U.S. at 11. In *Hall*, this Court characterized § 102 of the LMRDA "as a broad mandate to the courts to fashion 'appropriate' relief." *Id.* at 11. For this reason, even without express statutory authority, courts may award attorneys' fees to LMRDA claimants. *Id.* at 14.

The Courts of Appeal have applied this reasoning in holding that the LMRDA permits punitive damages. *See, e.g., Quinn*, 739 F.2d at 649-51. They have uniformly rejected Local 38's argument that punitive damages are *per se* appropriate. Instead, they have relied upon the district courts' discretion to ensure that punitives are permitted only in appropriate cases and with the same limitations generally applicable to these awards. *See, id.* (punitive damages should only be awarded in "egregious" cases and "must not be so great as to cripple the union financially and detract significantly from its ability to represent its members"); *Braswell*, 388 F.2d at 199-200 (allowing punitive damages where labor organization has acted with actual malice or reckless or wanton indifference to the rights of the aggrieved union member); *Morrissey*, 544 F.2d at 25 (same); *Cooke*, 529 F.2d at 820 (same); *Thompson*, 74 F.3d at 1509 (same); *Vandeventer*, 579 F.2d at 1380 (allowing punitive damages where evidence supported finding of malice); *Doty*, 908 F.2d at 1062 ("[I]t is clear that punitive damages are available to deter malicious violations of the LMRDA"). In the instant case, the Second Circuit affirmed the district court's finding that the jury properly awarded punitive damages.

CONCLUSION

There is no Circuit split on the issues raised in the petition, and the Second Circuit applied well-established legal principles in affirming the district court judgment. Certiorari is not warranted in this case.

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Respectfully submitted,

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